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MEASURE OF DAMAGES IN AN ACTION BASED ON FRAUDULENT REPRESENTATIONS.

If A sells B for $20,000 a large tract of wild land which he represents to contain forty-three sections, which in fact, however, only contains thirty-two sections, what is the measure of B's damages in case he recovers in a suit against A for injury caused by the latter's fraudulent representations? That was the exact question which perplexed and divided the United States Circuit Court of Appeals for the Fifth Circuit in the recent case of Walker & Co. v. Walbridge, 136 Fed. Rep. 19. The majority of the court hold that a declaration in an action of deceit which alleges that plaintiffs purchased from defendant a ranch for the lump sum of $20,000 in reliance upon defendant's representations, which were supported by an abstract of title produced by him, and the certificate of a county clerk, that the ranch contained 43 sections of land, which representation was false, in that defendant had no title to 11 of such sections, and that plaintiff obtained none, states a cause of action for the recovery of the value of said 11 sections, had defendant held title thereto as represented.

It seems that the decision of the court is contrary to the controlling decisions of the United States Supreme Court in Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39, and Sigafus v. Porter, 179 U. S. 122, 21 Sup. Ct. Rep. 34. In the first of these cases the plaintiff had purchased 4,000 shares of stock in a corporation, at $1.50 per share, for which he had paid the purchase price, $6,000, which he alleged he was induced to do by the false and fraudulent representations of the seller as to the value of the stock, which he averred was at the time of the purchase and of his pleading wholly worthless, and that, had the same been as represented by the defendant, it would have been worth at least $10 per share. The ruling in that case was that "the measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. * * * If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, but this liability did not include the expected fruits of an unrealized speculation." In Sigafus v. Porter it is said: "There are adjudged cases holding to the broad doctrine that in an action for deceit, based upon the fraudulent representations of a defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real, actual value at the time of purchase, and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid) at which the property could have been fairly valued if the seller's representations concerning it had been true. * * * We held in Smith v. Bolles that such was not the proper measure of damages; that case being like this, in that the plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of Smith v. Bolles."

The court in the principal case in distinguishing these decisions, said: "It seems clear to us that these cases do not apply to the case we have before us. It is not a supposed speculative profit which this action seeks to recover, but the actual value, be it more or less, of a large quantity of land which the plaintiffs were induced to purchase and pay for, and were induced to believe they had actually received and entered into possession of, which in point of fact they never received, but which they might have received and would have received if the defendant had truly been the

owner thereof, as he represented himself to be, and which at that time certainly had some substantial value, be it the amount claimed or any lesser amount, as may easily be ascertained by a proper inquiry before the court and jury. They seek only to recover this excess cash payment made to the defendant on his false representation of physical facts."

The dissenting opinion of Shelby J., is forcible and earnest. The learned judge reasons as follows: "A declaration in a suit for damages shows no cause of action unless it states facts which, if true, show that the plaintiff has been damaged. It is averred that the plaintiffs have paid to the defendant the agreed price of $20,000, and have possession of the ranch. There is no offer to rescind the sale. The suit, in effect, ratifies and confirms the sale, and seeks damages for the deceit as to the quantitiy of the land. On proof of the deceit, the plaintiffs would be entitled to recover, on proper allegations, the amount of their loss. If the land which they received was worth $20,000, it seems clear that they have lost nothing. If it was worth more than $20,000, they have profited to the amount of the excess by the purchase. In Sigafus v. Porter, 179 U. S. 116, at page 123, 21 Sup. Ct. Rep. 34, at page 37, 45 L. Ed. 113, which was an action for deceit in the sale of real estate, the supreme court has laid down the rule for the measure of damages in such cases: 'The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract.' The question in such case is, how much worse off are the plaintiffs than if they had not bought the land? If they had not bought the land, they would have in their pockets $20,000. It is clear that, to ascertain their loss, we must deduct from that amount the real value of the land they received. There is no other way in which to ascertain the loss which the plaintiffs have sustained by acting on the alleged representation of the defendant. That is the distinct rule established by the Supreme Court of the United States, by the English Court of Appeal, and by many state courts of last resort. Sigafus v. Porter, *supra*, and cases there cited; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. Ed. 279; Peek v. Derry, 37 Ch. Div. 541, 591, 594."

NOTES OF IMPORTANT DECISIONS.

REMOVAL OF CAUSES—PREJUDICE OF INHABITANTS AS A GROUND FOR REMOVAL WHERE RESIDENTS AND NON-RESIDENTS ARE JOINED AS DEFENDANTS.—Suppose a suit is filed against a non-resident and a resident jointly and the controversy is not separable, can the non-resident remove the cause to the federal court on the ground of prejudice? This is a question that has sometimes confused attorneys but is now settled by the recent case of Parker v. Vanderbilt, 136 Fed. Rep. 246, where the United States Circuit Court for the Western District of North Carolina held that under the statute providing that "any defendant," being a non-resident and a citizen of any state, who makes it appear to the satisfaction of the court that he cannot obtain justice in the state court where the action is pending, or in any court to which he may have the right to remove his case, on account of prejudice or local influence, is entitled to have the same removed to the federal court, the right of a defendant so to remove is not affected by the fact that a codefendant is a resident and a citizen of the state where the suit was brought. In making clear the distinction to be observed in this class of cases, the court said:

"The plaintiff contends that, inasmuch as one of the defendants is admitted to be a resident and citizen of North Carolina, this suit is not of such a character as to give his codefendant the right to remove it on the ground of prejudice and local influence. The statute provides that 'any defendant,' being a non-resident and citizen of another state, who makes it appear to the satisfaction of the court that he cannot obtain justice in the state court where the action is pending, or to any court to which he may have the right to remove his case on account of prejudice or local influence, is entitled to have the same removed to the federal court. The right of removal on account of prejudice or local influence is based on different grounds from that of removal on account of diverse citizenship. When it is sought to remove a case on account of diverse citizenship it is only necessary to show that fact, and that the jurisdictional amount is involved, in order to secure a removal of the case. Where a resident of the state where the suit is brought has been joined, the right of removal then depends on the question as to whether there is a separable controversy between the parties. Where the right of removal is based on the ground of prejudice or local influence, it must not only appear that the defendant is a non resident, and that the jurisdictional amount is involved, but it must also appear that the defendant cannot secure a fair and impartial trial in the state court, on account of prejudice or local influence; and, when it is made to appear that prejudice or local influence exists, then any defendant is guarantied the right of removal, by the express language of the

statute, even though a resident defendant may be joined with him in the same action."

See, also, on this point, Haire v. Railroad, 57 Fed. Rep. 322.

LANDLORD AND TENANT—RIGHT OF TENANT TO ENJOIN THE PAINTING OF ADVERTISEMENTS ON FRONT OF BUILDING.—Aesthetics seem to have no place of recognition in the law. Why this should be has never been made clear to the writer by any of the cases which have so decided, and the recent case of Fuller v. Rose (Mo.), 85 S. W. Rep. 931, vouchsafes no reason why the impairment of the beauty, proportion or propriety of one's property or surroundings is not a violation of some valuable right.

In the recent case to which we have called attention it appeared that defendants were the owners of an office building seven stories high, located in the business district of Kansas City. Plaintiffs, when this suit was brought, were the lessees of three adjoining rooms situated on the fifth floor. These rooms were inclosed on the south and east by outer walls and windows therein. During plaintiffs' tenancy the defendant Rose, owner of the building, caused a sign to be painted on the exterior of the south wall on the east end thereof, extending from the top of the building to the ground, and some 30 feet in width. This sign, painted in several colors, advertised the business of the defendant railway company. In execution and design it was a fair specimen of the signmaker's art. Plaintiffs did not claim any actual damage from its presence, but asserted that any advertising sign of this character upon an office building is offensive to their artistic taste, and in their eyes serves to cheapen the looks of the building; for which reason, and because the striking colors and design of the work of commercial art by contrast dimmed the lustre of their own signs painted upon the windows, they protested at the time the work was being done to the defendant Rose, and, finding their objections unheeded, brought this suit, an injunction proceeding, against the landlord, the railway company and the painters, all of whom were in the perpetration of the act complained of. The court, in denying the injunction prayed for, said:

"It is plaintiffs' contention that under their lease the title to the comparatively small portion of the outer wall represented by the area thereof which incloses their rooms is vested in them, which, if true, would make the acts of defendants in painting and maintaining thereon a part of the objectionable sign a continuing trespass, for which action would lie, regardless of the fact of actual damage. That which passes under a lease depends upon the intention of the parties, to be ascertained from the instrument itself. The character and surroundings of the leased premises are also important factors to be considered in determining the extent of the demise as intended by the parties. Winton v. Cornish, 5 Ohio, 477; Harrington v. Watson, 11 Ore. 143, 3 Pac. Rep. 173, 50 Am. Rep. 465; Lowell v. Strahan, 145 Mass. 1, 12 N. E. Rep. 401, 1 Am. St. Rep. 422; McMahon v. Vickery, 4 Mo. App. 230. In the absence of stipulation to the contrary, the lessee of a building to be used for business purposes acquires, under his lease, title to the whole of the building, including both sides of its outer walls which, of course, gives him the exclusive right to use the walls for all legitimate purposes, including that of advertising. Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388; Baldwin v. Morgan, 43 Hun, 355; McAdam on Landlord & Ten. § 442; Witte v. Quinn, 38 Mo. App. 681. Obviously, the presence of a number of tenants in a single building restricts the extent of the demise to each, and the rights and privileges incident thereto. The rights of all must be so curtailed that they will not interfere with each other. In this building all of the tenants possessed the right to the support and inclosure of the south wall, including the part thereof claimed by plaintiffs. It would lead to absurd conclusions to say that any tenant was vested with title to any portion of the outer walls. The title to them remained in the owner of the building, whose duty it was to maintain them for the benefit of all of the occupants. Shawmut Nat. Bank v. Boston, 118 Mass. 125; Leiferman v. Osten, 64 Ill. App. 578; Booth v. Gaither, 58 Ill. App. 263; McGinley v. Trust Co., 168 Mo. 257, 66 S. W. Rep. 153. It has been said by some authorities that tenants in buildings of this character, whose rooms are inclosed by an outer wall, have the right to use such portion of the exterior thereof for the placing thereon of their signs; but such right is a privilege acquired from universal custom—a mere incident to, not a parcel of, the demised premises, and consequently not derived from title. The landlord may deprive his tenants of such privilege by stipulations in the lease, in which case, the ownership of the walls remaining in him, he may use their outside surfaces for purposes of revenue. Knoepfel v. Ins. Co., 66 N. Y. 639; McAdam on Landlord & Ten. §§ 407–409; Lowell v. Strahan, *supra*. In the case before us the parties expressly agreed in the lease that plaintiffs were to be denied the use of any of the walls of the building for advertising their business. They were restricted to the use of the windows for such purpose. Evidently it was the intention of the parties that no other right to the wall was to be demised to plaintiffs than that of support and inclosure. Lowell v. Strahan, *supra*. The landlord, on his part, is required, in the use made by him of the wall, not to inflict damage upon his tenants. He covenanted to give them uninterrupted and peaceable possession of he respective premises, and therefore would have no right to place such advertising or other matter on the outside of his building as would tend to injure the business of any of his tenants. No such injury is proven, nor even claimed, by plaintiffs. Aesthetics liebeyond the

cognizance of either equity or law in such cases. Damage of a more substantial nature must be involved. Offended taste will not support a cause of action."

PARTNERSHIP—WHETHER SALE OF ONE PARTNER'S INTEREST WILL DISSOLVE A MINING PARTNERSHIP. — The distinction between a mining partnership and other ordinary partnerships is well set forth in the recent case of Blackmarr v. Williamson, 50 S. E. Rep. 254, where the Supreme Court of Appeals of West Virginia held that one of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. And the court further held that a member of a mining partnership may sell his interest therein to whomsoever he may without the knowledge or consent of his co-owners. The court, in a short but interesting argument, said:

"There is no dispute between the parties as to the fact of the existence of a mining partnership between the plaintiff and the defendants. Such partnership does not rest upon the same principles as the ordinary partnership. There are not necessarily any contractual relations between them. There are many definitions of what is required to constitute a partnership. In 22 Am. & Eng. Ency. of Law (2d Ed.), 13, it is given thus: 'Pratnership is the relation existing between two or more persons who have contracted together to share, as common owners, the profits of a business carried on by all or any of them on behalf of all of them.' And at page 15, *Id.*, it is stated as a rule: 'In an ordinary partnership the contract creating it must have been entered into by all the partners. It is only by the unanimous consent of all the persons concerned that they become partners. A third person cannot be introduced into the concern as a partner without or against the consent of a single member. This principle is what is called *delectus personarum*, and it is a fundamental principle of partnership law. This rule in no sense applies to mining partnerships.' At page 226, *Id.*, the definition and nature of the last-named partnership is stated as follows: 'A mining partnership exists between the tenants in common of a mine who work it together and divide the profits in proportion to their several interests. Ownership of shares or interests in the mine is an essential element of a mining partnership. The relation does not exist between the owners of a mine and one who, under a contract with them, works a mine for a share in the profits or proceeds. Mere profit-sharing will not create a mining partnership. * * * A mining partnership differs from an ordinary partnership in the fact that no contract between the partners is necessary to create it; that there is no *delectus personarum*, so that the death of a member or the transfer of his interest does not operate as a dissolution, and that there are no rights of survivorship. Because of the absence of these features, mining partnerships have been said not to be true partnerships, but rather a cross between tenancies in common and partnerships proper.' In Duryea v. Burt, 28 Cal. 569, it is held: 'One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership.' And in Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96, it is held as an additional rule to that just cited from Duryea v. Burt, 'that the law does not imply any authority either to a member of such partnership or to its managing agent to bind the company or its individual members by a promissory note or a contract of indebtedness executed in the name of the company, but it is incumbent on the party claiming to hold the company for such indebtedness to show that the person executing or contracting the same in the name of the company had power and authority to do so.' This question of mining partnership is discussed, and many authorities cited, in a note at the end of Skillman v. Lachman, 83 Am. Dec., beginning at page 103. It is also discussed at some length in Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777. There it is held (Syl., point 2): 'When members of a mining partnership cannot agree in management, those having a majority interest control its management in all things necessary and proper for its operation.' It is there also held (Syl., point 3): 'A sale of his interest by a member of a mining partnership to another member or a stranger does not dissolve the partnership, as in ordinary partnerships.'" In that case the partnership was dissolved, good cause for such dissolution being shown. As stated in the opinion: 'The bill demanded a dissolution. It showed abundant cause, and the evidence shows abundant cause of dissolution.' The evidence showed violent disagreements and dissensions, making it plain that the business was hopeless of success and prosperity, and the interest of all parties demanded absolute dissolution at the hands of the law. In the case at bar it is alleged in the bill 'that there is lack of harmony between said mining partners as to the further operating of said lease.' This is the only allegation of disagreement or dissension among the members of the partnership—a lack of harmony as to the further operating of said lease. The evidence shows that the business was largely, but not wholly, under the control and management of the plaintiff and appellee. Plaintiff purchased his seven-sixteenths interest in said lease, as far as the record shows, without the knowledge or consent of his co-owners; and they have since been working in harmony, except upon the question of further development. Plaintiff has a perfect right to get rid of his interest in the same way that he obtained it—simply by selling out to whomsoever he may, without even the knowledge or consent of his co-owners. The bill fails to show any reasonable ground for a dissolution of the partnership by the sale of the property under decree. The other owners all insist that a public

sale under decree of the court would be greatly to the prejudice of their interests. It would appear to be inequitable for a stranger to buy an interest in a concern of this kind, and then, without the most cogent reason, to enforce the sale of the property of his co-owners against their consent, and to the prejudice of their interests. They have invested their money in property, and are seeking to operate it to their profit, and have faith in the enterprise, and it does not appear to be running at a loss. The bill fails to show cause for the intervention of a court of equity, and for that reason the demurrer should have been sustained; while the evidence fails to sustain a bill for the relief asked, even if the allegations had been sufficient to warrant the granting of relief.

THE TRUE CRITERIA OF CLASS LEGISLATION.

That the state may absolutely prohibit the prosecution of any employment or business the existence of which is injurious to the public welfare, and that it may regulate and control those businesses or employments which, unless regulated, will become injurious, is now too well established to admit of any controversy. It would too seem to be as equally clear that the only limitations upon this power should be that the exercise thereof should be reasonable and the result of a real and not a fancied or theoretical necessity. When indeed this is the case, that is to say when the thing or act or business or occupation sought to be regulated or forbidden, is really injurious to the public as a whole, or to any large portion thereof, it in effect becomes a nuisance,[1] and since the courts have time and again declared that there can be no property rights in that which is a nuisance,[2] there can be no recourse to the constitutional provisions which forbid the taking of property without due process of law, which guarantee the equal protection of the laws or which safeguard individual liberty. It can in fact be safely said that when the constitutions, both state and federal, were adopted, the words "liberty" and "property" used in them had a definite and well defined meaning, and that that meaning excluded all those acts and things which were actually injurious to the body politic, and which it would be the province of no sane government to encourage or to protect, much less to perpetuate by a constitutional guarantee. To hold otherwise would be to hold that the constitutional provisions in question were intended to take from the state the inherent right of self-protection and to lay the foundations of perpetual anarchy. The political principle indeed which lies beneath the maxim *sic utere tuo ut alienum non lædas* is the basic principle which binds together every civilized community, and without which civilized communities cannot exist. The safeguards expressly afforded by the constitutions, therefore, to the liberty of person and property, were all that were necessary and all that were intended.

It was certainly never a principle of the common law that the courts should be deemed powerless to order the suppression or abatement of one nuisance merely because another remained uncontrolled, nor could it with reason be contended that it was the intention of the framers of our several constitutions that the legislatures should be precluded from prohibiting the doing of certain injurious acts, merely because they had not happened to legislate against all things injurious. It is certainly true that there can in the main be but one due process of law, and that that due process of law implies "a general law, a law which hears before it condemns, which proceeds upon inquiry, which renders judgment only after trial."[3] And it is also equally true that class legislation in the form of special privileges was never sanctioned. The desire for fair and impartial trials, however, and the prejudice against class privileges and monopolies should never in reason be allowed to go so far as to prevent proper police control and regulation where no privileges are sought to be conferred but public injury merely prevented. Strangely enough,

[1] "A common nuisance is an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience to or damage to the public in the exercise of rights common to all citizens. Every person commits a common nuisance, within this definition, who does anything which endangers the health, life or property of the public, or any considerable part of it; and everything is considered to endanger health, life or property which either causes actual danger thereto or which must do so in the absence of a degree of prudence and care, the continual exercise of which cannot reasonably be expected." Parker and Worthington, Public Health and Safety, Sec. 177.

[2] See Missouri, etc., Ry. Co. v. Haber, 169 U. S. 613, 46 Cent. L. J. 423.

[3] Dartmouth College v. Woodward, 4 Wheat. 519.

however, a contrary position has been taken in not a few decisions, while but few courts or writers seem to have arrived at or offered any satisfactory definition of or criteria for the "class legislation" concerning which so many seem to have a more or less vague apprehension. In passing, for instance, upon the constitutionality of a statute of Illinois which prohibited the employment of females in factories and workshops for more than eight hours in any one day the supreme court of the state said:[4] "We are inclined to regard the act as one which is partial and discriminating in its character. If it be construed as applying only to manufacturers of clothing, wearing apparel and articles of a similar nature, we can see no reasonable ground for prohibiting such manufacturers and their employees from contracting for more than eight hours of work in one day, while other manufacturers and their employees are not forbidden to so contract. If the act be construed as applying to manufacturers of all kinds of products, there is no good reason why the prohibition should be directed against manufacturers and their employees and not against merchants or builders, or contractors or carriers, or farmers or persons engaged in other branches of industry, and their employees therein. Women employed by manufacturers are forbidden by section 5 to make contracts to labor longer than eight hours in a day, while women employed as saleswomen in stores, or as domestic servants, or as bookkeepers or stenographers or typewriters, or in laundries or in other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose. The manner in which this section thus discriminates against one class of employers and employees and in favor of all others, places it in opposition to the constitutional guaranties hereinbefore discussed and so renders it invalid." In like manner the Supreme Court of Nebraska held an eight hour labor day invalid because it excepted from its provisions persons engaged in farm or domestic labor,[5] while the Supreme Court of Colorado,[6] held it incompetent for the legislature to single out the workmen in under ground mines and smelters and to restrict them as to the number of hours that they should work, or their employers as to the number of hours they should exact of them, as against employers and employees in other lines of industry.[7]

The logic of these decisions practically is that all legislation except that which is "omnibus" in its character is unconstitutional, and in arriving at them the courts seem to have been guilty of a lack of discrimination which is somewhat remarkable. We can indeed accept their premises in every case, but must differ materially from their conclusions and application of the principles involved. When the Supreme Court of Illinois says that "the law of the land is the opposite of arbitrary, unequal and partial legislation;" that "the legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions;" that "the man who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it is deprived of liberty in matters of primary importance to his pursuit of happiness;" that "if one man is denied the right to contract as he has hitherto done under the law and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of the right;"[8] we must in the main yield a ready assent. It is incumbent upon us however to use the words understandingly, to understand the premises thus laid down, and to determine when and when a law is not "arbitrary" and "unequal," what are "like conditions" and when men may be said to be acquiring property "in the same manner." And is not the test of class legislation after all whether or not by that legislation any person is hindered in his struggle or competition with his fellow men, and not whether the rules which are adopted to regulate his particular trade or calling are made applicable to trades and callings with

[4] Ritchie v. People, . N. E. Rep. 454.

[5] Low v. Rees Printing Company (Neb.), 59 N. W. Rep. 362.

[6] *In re* Morgan (Colo.), 58 Pac. Rep. 1071, 50 Cent. L. J. 6 ; so, *In re* Eight Hour Bill, 21 Colo. 29, 39 Pac. Rep. 328; *In re* House Bill No. 203, 21 Colo. 27, 39 Pac. Rep. 431, 44 Cent. L. J. 465.

[7] See, also, Frorer v. People, 141 Ill. 171, 31 N. E. Rep. 395, 34 Cent. L. J. 315; Millett v. People, 117 Ill. 294; Ramsey v. People, 142 Ill. 380.

[8] See opinion in Ritchie v. People, 155 Ill. 99, 40 N. E. Rep. 454.

which he has no concern? Is not this all that the term "equal protection of the laws" implies?

There is for instance no competition between the woman working on the farm and the woman in the office, or between the woman in the office and the woman in the factory, nor even between the women working in different kinds of factories or workshops, nor is there any competition between the manufacturer and the farmer or the merchant and the lawyer. No regulation then of the class may be necessary, and if not necessary it is a deprivation of property without reason based upon the public welfare, which is nothing more or less than a deprivation of property without the process of law.[9] If however if is necessary and is wise in its nature, the legislation which imposes it should not be nullified merely because it is not broad enough to include the whole of organized society. The inquiry should be. is it wise, is it necessary, does it include all competing with one another in the particular trade, business, or calling, not whether other independent callings are similarly regulated and controlled. A beginning for all police legislation must be made somewhere, and that somewhere is where the exigency is made manifest to the legislature. Regulations may also be needed elsewhere, but that need does not necessarily negative the necessity for the regulation in the place where it afforded.[10] In speaking of a co-employee act made applicable to railroads merely, Mr. Justice Field of the Supreme Court of the United States expressed the correct theory when he said: "It meets a particular necessity and all railroad corporations are without distinction made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion, whether the same liability shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories."[11]

"The fourteenth amendment, in its implied prohibition of class legislation," it has been said, "does not relate to territorial arrangements made for different portions of the state, nor to legislation which in carrying out a public purpose is limited in its operation, but, within the sphere of its operation, affects alike all persons similarly situated."[12] "Classification is not necessarily discrimination, and a reasonable discretion in such matters has been generally conceded by the courts."[13] Where, indeed, it is established and conceded that the regulation or licensing of a particular trade or calling is a proper matter for the exercise of the police powers of the state or municipality, the courts will seldom lend an ear to the contention that class legislation exists because other pursuits and callings or other branches of the same calling have not also been licensed or regulated. We will, indeed, as a rule only find the plea of class legislation strongly urged, where the right and power to legislate on the particular subject matter at all has itself been doubted or the particular regulation has in itself been unreasonable. In these cases the cry of class legislation has usually been an added reason and its use or addition was entirely unnecessary and has almost uniformly been unfortunate.[14] "A law is general, not because it embraces all of the governed, but when many are embraced in its provisions, and all others may be, when they occupy the position of those who are embraced."[15] Where competition exists it is no doubt true that the classification "must be based upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."[16] It must treat all alike under the same conditions, that is competing with one another under the same circumstances, and must bring within its influence all who are under the same conditions. "There must be a substantial distinction, having a reference

[9] See also opinion in People v. Smith (Mich.), 66 N. W. Rep. 882, 42 Cent. L. J. 342.

[10] See opinion in People v. Smith (Mich.), 66 N. W. Rep. 382, 42 Cent. L. J. 342; Lochmer v. New York, 25 Sup. Ct. Rep. 539.

[11] Missouri Pacific Railway Co. v. Mackey, 127 U. S. 205, 210. See, also, People v. Smith (Mich.), 66 N. W. Rep. 382, 42 Cent. L. J. 342.

[12] See opinion in People v. Haynor, 43 N. E. Rep. 541.

[13] Waite, C. J., in Chicago, B. & Q. Ry. Co. v. Iowa, 94 U. S. 155; McAunich v. M. & M. R. Co., 20 Iowa, 343; Knesley v. Cotterell (Pa.), 50 L. R. A. 86.

[14] See Ritchie v. People, 155 Ill. 101, 40 N. E. Rep. 454; *In re* Morgan (Colo.), 58 Pac. Rep. 1071, 50 Cent. L. J. 61.

[15] See opinion in Hawthorne v. People, 109 Ill. 311.

[16] See opinion in Nichols v. Walter, 37 Minn. 264.

to the subject matter of the proposed legislation, and between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree at least, account for or justify the restriction of the legislation."[17] Where, however, there is no competition between the classes included and the classes excluded, the reasonableness and of the real necessity for the particular legislation should be the only criteria of its validity.[18]

If the criteria just given are the proper ones, and they certainly are according to the better considered if not the larger number of decisions,[19] the Supreme Court of Nebraska has in its *dicta*, uttered by way of concession in the case of Low v. Rees Printing Company,[20] to which we have before referred, erred as radically as in its main conclusions. "It is perfectly competent," the court says, "to legislate concerning married women, bankers or traders, and the like. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations and to establish distinctions in the rights, obligations, duties and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they may be general in their application to the class or locality to which they apply; and they are then public in their character and of their propriety and policy the legislature must judge." This statement no doubt expresses the correct rule, provided that when we say with the Nebraska court, that "it is perfectly competent to legislate concerning married women, bankers or traders and the like," we bear in mind that the classification is only justifiable in those matters in which the fact of marriage really alters the status of the woman, or being a banker, that of the man. For, where competition exists, in order that a discrimination shall pass unchallenged, there must be a danger or tendency to danger peculiar to the business or persons affected, and not found in those excepted from the provisions of the law, or at least there must be a public policy peculiar to the class in question. The class legislation, in short, that is tolerated by the law is that "which relates to persons and things as a class and not to particular persons or things of a class."[21] There are, it is clear, many matters in which a married woman stands on no different footing than her unmarried sister or her male competitors, and in which a banker or trader is as other men. Neither should be needlessly interfered with in their rational competition with others. It is unnecessary to say, however, that persons are not in competition merely because they are engaged in the common pursuit of wealth or of the means of a livelihood. The means followed must in the main be the same.

Perhaps, after all, however, the principal conflict in the matter ranges around the question as to whether this discretion of classification is one which rests with the courts or with the legislature. The logical position would seem to be that, granted that the subject matter is within the police power of the state, and this the courts must decide, the decision of the question of the exigency, that is the need of regulation in any particular calling or locality must rest with the legislature, and like the decision of the jury on any other question of fact, this discretion should not be interfered with by the courts. Chief among courts which adhere to this rule are those of the Supreme Court of the United States, Michigan, California, and in later years those of the state of New York.[22] We have already quoted from

[17] State v. Hammer, 42 N. J. L. 439; Johnson v. St. Paul & D. R. Co., 43 Minn. 222.

[18] People v. Smith (Mich.), 66 N. W. Rep. 382.

[19] Missouri Pacific Ry. v. Mackey, 127 U. S. 205, 210; People v. Smith, 66 N. W. Rep. 382; Hawthorne v. People, 109 Ill. 311; People v. Haynor (N. Y.), 43 N. E. Rep. 541; State v. Holden, 14 Utah, 71, 46 Pac. Rep. 756, 44 Cent. L. J. 1; Holden v. Hardy, 169 U. S. 366, 46 Cent. L. J. 355.

[20] 59 N. W. Rep. 362.

[21] Gillespie v. People, 188 Ill. 176, 52 Cent. L. J. 101; Mathews v. People, 202 Ill. 389, 401, 402.

[22] People v. Bellett (Mich.), 57 N. W. Rep. 1004, 38 Cent. L. J. 272, 333; Wenham v. State (Neb.), 91 N. W. Rep. 421, 424; People v. Smith (Mich.), 66 N. W. Rep. 382, 42 Cent. L. J. 342; State v. Nichols (Wash.), 69 Pac. Rep. 372; People v. Haynor (N. Y.), 43 N. E. Rep. 541; *Ex parte* Northrup (Oreg.), 69 Pac. Rep. 445; State v. Nichols (Wash.), 69 Pac. Rep. 372. See also Lochner v. State, 76 N. Y. Supp. 396, 177 N. Y. 145, 69 N. E. Rep. 373.

a decision of the first named tribunal on the question.[23] The Supreme Courts of New York and of Michigan, indeed, have applied the principle almost, it would seem, with a reckless abandon of responsibilty. In the latter state a statute was for instance sustained which forbade under penalties larger than in other cases of the violation of Sunday law, the labor of barbers upon the Sabbath day, the court saying in effect that it was for the legislature and the legislature alone to determine whether the labor of barbers upon the Sabbath was more injurious and therefore needed regulation not provided for in other cases of Sunday desecration.[24] So, too, in New York a statute was sustained which forbade persons to engage in the business of the barber upon the Sabbath, everywhere within the state, except in the cities of NewYork and Saratoga Springs, in which latter places the shops could be kept open until one o'clock in the afternoon.[25] Of this opinion it may fairly be said that, even though we concede that barbering of all employments upon the Sabbath is the most henious and most needs regulation, it is difficult to conceive why it should be deemed less henious or less injurious to the body politic, in the cities mentioned, than elsewhere in the state of New York. The decision indeed can only be, and is alone justified by the court, on the theory that the legislature is the exclusive judge of the necessity and scope of police power intervention. Other courts, however, are not as willing to yield to the legislative discretion and relentlessly scrutinize every law, both in regard to its general nature, its particular application and the exigency which is claimed to lie beneath it. Chief among these courts are those of Illinois and Colorado.[26] The struggle is one which will last far into the future—the old conflict between the judge and the legislator, which will last as long as the trained few mistrust the untrained many. It is merely the result of the same tendency on the part of the American courts which years since called for the following clause in an act of the British parliament: "And be it finally enacted, that the present act, and every clause, article and sentence comprised in the same, shall be taken and accepted according to the plain words and sentences therein contained, and shall not be interpreted or expounded, by color of any pretense or cause, or by any subtle arguments, or inventions, or reasons, to the hindrance, disturbance, or derogation of this act, or any part thereof, etc."[27]

ANDREW ALEXANDER BRUCE.
University of North Dakota.

[23] Railway Co. v. Mackey, 127 U. S. 205. But see Lochner v. New York, 25 Sup. Ct. Rep. 539.

[24] People v. Bellet (Mich.), 57 N. W. Rep. 1004.

[25] People v. Haynor (N. Y.), 43 N. E. Rep. 541.

[26] Ritchie v. People, 155 Ill. 98, 40 N. E. Rep. 454; Frorer v. People, 34 Cent. L. J. 315, 141 Ill. 171, 31 N. E. Rep. 395; Millett v. People, 117 Ill. 294; Ramsey v. People, 142 Ill. 380; *In re* Morgan (Colo.), 58 Pac. Rep. 1071, 50 Cent. L. J. 61. See also the late case of Lochner v. New York 25 Sup. Ct. Rep. 539.

[27] 28 Henry VIII, ch. 7, Sec. 28.

CHAMPERTY — LIABILITY OF EMPLOYERS' LIABILITY INSURANCE COMPANY FOR INTERMEDDLING.

BREEDEN v. FRANKFORT MARINE ACCIDENT & PLATE GLASS INSURANCE CO.

Kansas City Court of Appeals, Missouri, Feb. 27, 1905.

Plaintiff alleged that, having sued his employer, a mining company, for injuries, defendant insurance company, unlawfully, willfully, and maliciously, without interest, "maintained the mining company" by prosecuting an appeal from a judgment in favor of plaintiff; that defendant paid all the expenses of the appeal, which resulted in a reversal, after which defendant maintained the defense at its own expense, and in various ways caused delay, until plaintiff only succeeded in recovering a second judgment after the mining company became insolvent, and was then compelled to accept $1,000 in settlement of a judgment for $3,500; that, but for the defendant's unlawful interference, plaintiff would have collected the first judgment, and would have secured a second judgment in time to have collected it before the mining company became insolvent. Held, that the petition stated a cause of action for maintenance.

Where an insurance company has indemnified a corporation from liability for injuries to its employees, it is not a volunteer in defending an action against insured for such injuries, and is therefore not liable, as an intermeddler, for maintenance.

ELLISON, J.: Plaintiff was engaged in mining, as a laborer, for a corporation known as the Big Circle Mining Company, and was injured, as he alleged, by reason of the negligence of that company. He brought suit against the company for damages, and obtained a judgment for $2,500. The mining company appealed to this court, where the judgment was reversed, and the cause remanded for a new trial. 76 S. W. Rep. 731. At the second trial this plaintiff again prevailed, and obtained a judgment against the mining company, this time for $3,500. Of the latter judgment, plaintiff accepted $1,000 as in full, and satisfied the record. Thereafter he instituted this action of maintenance against the present defendant for damages on account of this defendant having

willfully intermeddled and unlawfully maintained the defense of the mining company in his case for personal injury. The defendant demurred to the petition as not stating a cause of action. The demurrer was sustained, and, plaintiff, in view of that ruling, having refused to amend, judgment was rendered for defendant, and plaintiff appealed.

Maintenance is one of the old actions at common law, the right of which exists to this day. Bradlaugh v. Newdegate, 11 Q. B. Div. 1. It is defined as an "officious intermeddling in a suit that no way belongs to one, by assisting either party, with money or otherwise, to prosecute or defend." And it is said "to be an offense against good morals, in that it keeps alive strife, and perverts the remedial powers of the law into an engine of oppression." 5 Am. & Eng. Ency. of Law (2d Ed.), 815. The offense may be committed by stepping in after litigation has been begun, as by encouraging and aiding its origin. Bradlaugh v. Newdegate, 11 Q. B. Div. 9. Champerty is generally treated by text-writers in connection with maintenance, and is also one of the old common law actions which yet subsist. Duke v. Harper, 66 Mo. 51. 37 Am. Rep. 314. These old actions, though akin, are unlike in many particulars. The champertor has in view a profit to himself, in a share of the spoils of the litigation. The maintainer is more of a voluntary intermeddler, and stirrer up of strife for the love of it. He is described as an "officious" intermeddler. In other words, he interferes where he has no business.

The action being recognized to exist as a common law action, we have examined the petition, with a view to ascertaining the legal merits of the demurrer. We find that it sets out the controversy which existed in litigation between this plaintiff and the mining company; that he obtained judgment against said company; that this defendant, "unlawfully, willfully, and maliciously, without having any interest in the case, maintained the mining company by obtaining and prosecuting an appeal from the judgment," etc. (describing how it did so). Continuing, it alleged that all expenses of procuring and perfecting said appeal were paid by the defendant herein. The petition then alleges the reversal of the judgment, and remanding of the cause for another trial; that at such second trial this defendant continued to maintain the defense at its own expense; that by various ways it caused the case to be continued, and changes of venue to be had, but that finally, at the second trial, plaintiff obtained judgment against the mining company for $3,500. It then alleges that before the second trial the mining company had become insolvent, so that it became impossible for plaintiff to collect his judgment, and that, in view of such condition of the mining company, he was compelled to accept $1,000 in full of his said judgment; that at the rendition of the first judgment the mining company was solvent, and its insolvency came about between the first and second judgment, and that, but for defendant's unlawful interference, he would have collected the first judgment; and that, but for defendant's continued unlawful interference and delay before the second trial, he would have secured his second judgment in time to have collected it before the mining company became insolvent. In our opinion, the petition stated a cause of action. If the acts charged are true (and we must so consider them), defendant was guilty of maintenance, and should respond in damages.

Though it does not appear of record, yet, in view of the statement of counsel, it may turn out that defendant, in its interference with plaintiff's case against the mining company, was not an officious intermeddler. It is said that this defendant is an accident insurance company, and that in that capacity it had indemnified the mining company, upon a valuable consideration, to hold such company harmless from liability in personal injury cases arising against it in favor of employees. Now, if that be true, defendant is not guilty of maintenance in taking part in the litigation between plaintiff and the mining company, and in using the same endeavor and the same means in aid of the mining company to defeat the case which that company might legally have used without such aid. The law recognizes that, where one has an interest in the result of a controversy, he may aid in its litigation without subjecting himself to prosecution for maintenance, civilly or criminally. Thus he may be a surety or guarantor on a note, and aid the principal in defense. He may be a warrantor of title to property, and aid and sustain a defense by the warrantee. The landlord may aid his tenant, etc. 5 Am. & Eng. Ency. of Law (2d Ed.), 821. But more than that, there need not be a pecuniary interest in the result, to absolve the aider from the charge of maintenance. The parent may aid the child, or the child the parent, and so in other substantial degrees of relationship. And yet, more than that, the law extends its charity to the charitable and compassionate, and will not pronounce it maintenance for one to aid his poor friend, and thus assist in protecting him from what he deems an oppression or a wrong. Harris v. Brisco, 17 Queen's Bench Div. 510; Gilman v. Jones, 87 Ala. 691, 5 So. Rep. 785, 7 So. Rep. 48, 4 L. R. A. 113. It therefore seems clear to us that, if this defendant had the interest in the result of plaintiff's suit against the mining company which has been suggested, it had a right to take part in, and aid that company in, the defense.

The judgment is reversed and cause remanded. All concur.

NOTE.—*Whether Agreements Between Interested Parties to Maintain Suit for Joint Benefit Constitute Maintenance.* — It may be laid down as a general proposition that it is unlawful to maintain another suit, unless the person maintaining has some interest in the suit distinct from that which he may acquire by the agreement to maintain, or is connected

with the suitor by some social relation. Thallheimer v. Brinckerhoff, 3 Cow. 623, 15 Am. Dec. 309.

We shall discuss here the first of these two classes, *i. e.*, "maintenance between interested parties." Thus it has been held not to be maintenance for a vendor with warranty to uphold his vendee in a suit about the title. Williamson v. Sammons, 34 Ala. 691. Thus also a contract between the vendor and vendee of a parcel of land to share between themselves the benefit of a successful defense to a foreclosure suit in which they were co-defendants is not a champertous contract. Allen v. Frazee, 85 Ind. 283. So also when several persons have been induced on the same representations to buy stock from defendants, it is not maintenance for them to contribute to the expense of a suit by one of them to recover the money paid by him, as they all have a common interest in settling the question as to defendant's liability. Davie's v. Stowell, 78 Wis. 334, 47 N. W. Rep. 370. So also, where several persons have an interest in the same subject matter and they agree that one of them shall bring a suit in his own name, for the joint benefit of all, and also agree as to the manner of distributing the avails of the suit towards payment, or in discharge of their several claims, the objection of maintenance does not apply to such an agreement. Frost v. Pains, 12 Me. 111. So also it has been held that an agreement between a grantor and the grantee, whereby the grantee is to defend against an adverse claim to the property at their joint expense, is not champertous. Jones v. Shaw, 56 Mich. 332. 23 N. W. Rep. 33. So also an agreement by a mortgagee that he would foreclose a mortgage executed for his protection as surety, and authorize the sheriff's deed to be made to the payee of the note upon which he was surety, in consideration that he should be released as such surety, and be reimbursed for a certain sum he had already paid, was held not to be champertous. Cooley v. Osborne, 56 Iowa, 526. So also it has been held that an agreement between the defendant in an ejectment suit and his grantor, who was interested in maintaining the title, that the latter should take upon himself the defense of the suit and indemnify the former against the same is not invalid on the ground of maintenance. Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572.

It is also a well known rule that one who is really a party to a suit and bound for the costs therein, may agree with another party in interest to pay the entire costs—if that party will join in the suit, and such agreement is not champertous and will not invalidate an agreement for a contingent fee made with an attorney with knowledge of this arrangement. Jewell v. Neidy, 61 Iowa, 299, 16 N. W. Rep. 141.

Where two judgment creditors had sold the land of the defendant and one of them became the purchaser, he bidding, by agreement, the amount of both judgments, and such purchaser filed his bill against a third person, who held the land by a fraudulent conveyance from the debtor, with an agreement that his fellow judgment creditor should pay half the costs in the event the suit was lost, it was held that this was not a champertous contract in regard to the suit. Tilman v. Searcy, 26 Tenn. 347.

In conclusion it may be said to be the general rule that when one has distinct interests, whether great or small, certain or uncertain, vested or contingent, he may maintain. McCall v. Capehart, 20 Ala. 521; Lewis v. Brown, 36 W. Va. 1, 14 S. E. Rep. 444; Thallhmier v. Brinckerhoff, 2 Cow. 623, 15 Am. Dec. 309; Barker v. Barker, 14 Wis. 131; Johnston v. Smith, 70 Ala. 108; Mobile & Ohio R. R. v. Etheridge, 84 Tenn. 398.

JETSAM AND FLOTSAM.

OUTLAWED MONEY.

The financial world will be greatly startled by a decision just rendered in Minnesota by a justice of the peace, to the effect that a national bank bill is outlawed and cannot be of any value to anyone, and therefore cannot constitute a good tender for a debt, after six years from its date. The opinion of the learned justice states that the law is to the effect that a demand must be made within six years in order to preserve a cause of action on a demand note, that the bank note is a demand note, and in the absence of proof that payment thereof had ever been demanded of the bank, the note is outlawed. Strange that no one thought of it before.

PUBLIC'S RIGHT IN COURT.

Lord Alverstone, the lord chief justice of England, has once again proclaimed the doctrine already enunciated some four score years ago by another judge of the king's bench, Sir William Bayley, that the public has a right to be present at trials and that judges have no authority to bar them out, save in the rare instances when the interests of morality and decency necessitate a case being heard in camera. According to the lord chief justice, "it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, have a right to be present for the purpose of hearing what is going on." In view of this ruling there will be no further attempt to exclude the public from causes *celebre* for the benefit of the favored few who have been provided with tickets or invitations, a practice which has become common on both sides of the Atlantic, and it would be interesting to know what the judges in this country have to say with regard to the lord chief justice of England's decision about the matter.

PROMISE OF MARRIAGE WITH MUTUAL KNOWLEDGE OF PRESENT LEGAL DISQUALIFICATION.

It has been held that a husband cannot bind himself to a future marriage conditioned upon obtaining a decree of divorce or on the dissolution of his marriage by the death of his wife. Noice v. Brown, 38 N. J. L. 228, 39 N. J. L. 133. The law properly holds such contracts contrary to public policy. So, also, the courts of New York have held that if at the time of a promise the promisor is disqualified from entering into the marriage relation because of a decree dissolving a former marriage and forbidding him to marry again during the life of his former wife, the agreement is void and no action for breach of promise will lie. Haviland v. Halstead, 34 N. Y. 643. An application of the same principle has recently been made by the Supreme Court of Tennessee in the case of Johnson v. Iss (February, 1905), 85 S. W. Rep. 78. Shannon's Code (of Tennessee), section 4188, provides that a second marriage cannot be contracted before the dissolution of the first, but that the first shall be regarded as dissolved for such purpose if either party has been absent five years, and is not known to the other to be living. It was held that a contract to marry a married woman, whose husband had disappeared less than five years prior thereto, was immoral, and afforded no ground for damages for a breach, though it was understood that the marriage should not take place until the five years elapsed or a

divorce should be obtained by the woman. The court said: "An action for breach of promise of marriage. The plaintiff in error relies upon the following section of the code (Shannon's Code, sec. 4188): 'A second marriage cannot be contracted before the dissolution of the first. But the first shall be regarded as dissolved for this purpose, if either party has been absent five years, and is not known to the other to be living.' A plea was filed making the defense that the plaintiff was a married woman at the time the contract was entered into. To this she filed a replication alleging, among other things, a promise after the five years had expired. In her evidence before the jury, however, she testified that she intermarried with her husband on the 26th of May, 1898, that they lived together three weeks, that at the expiration of that time he disappeared, and that the last promise which the defendant made to her was in January, 1903. This was only four and one-half years after the disappearance of the husband. It thus appeared from the plaintiff's testimony that while she was still, in the eyes of the law, a wife, she engaged herself to be married to the defendant, Iss. Such a contract, made under the circumstances stated, is against public policy, and can furnish no standing to a plaintiff in any court. The illegality of the contract was not cured by the fact that the marriage was not to take place until after the five years prescribed by statute had expired, or until plaintiff should procure a divorce from her husband. Such contracts are immoral, and cannot be recognized by the courts of this state; and the circuit judge acted within his powers, and correctly, when he arrested the further progress of the case and dismissed it, upon the illegal nature of the demand of the plaintiff thus incontestably appearing. Of course, the case above stated is to be differentiated from one in which an innocent party makes a contract of marriage with another who is married, in ignorance of the fact that such other person is at the time a married man or woman."

This decision is to be commended, first, because logically it falls within the principles of public policy laid down in the cases above cited, and, second, because the right to sue for breach of promise of marriage ought not to be extended, but, if anything, curtailed.—*New York Law Journal.*

SPECIFIC PERFORMANCE OF NEGATIVE COVENANTS.

Should a negative contract be enforced solely because it is such, or should the ordinary rule of inadequacy of legal remedy apply? Though the authorities are in apparent conflict, those holding that such a contract is inherently subject to specific performance are either *dicta*, Kimberly v. Jennings (Eng. 1836), 6 Sim. 340, or when considered upon their facts an actual inadequacy of legal remedy will be found. Whittaker v. Howe (Eng. 1841), 3 Beav. 383. A recent case in Illinois, however, raises the question squarely by denying that inadequacy of legal remedy determines the jurisdiction of equity in these contracts. Andrews v. Kingsbury (Ill. 1904), 72 N. E. Rep. 11.

When equity takes jurisdiction over contracts it is in its concurrent or supplemental jurisdiction, Fry on Specific Performance, 3d ed., § 22, the ordinary remedy being damages for breach of contract. Fry, *supra*, §§ 41, 44. When a negative contract is broken there is usually a substantial pecuniary loss, and the plaintiff is entitled to reimbursement. If the breach is final the injury is frequently inflicted to a going business, where it would be impossible to measure the damages without speculation, and the remedy in equity would be fully justified. Williams v. Montgomery (1896), 148 N. Y. 519; Finley v. Aiken (Pa. 1854), 1 Grant's Cas. 83; but where the damages can be definitely proved no case has been found in which equity has taken jurisdiction. See Fry, *supra*, § 51. In the case of continuing covenants there are two lines of decisions. Some courts require that all damages, present and prospective, be assessed in one action. Tippin v. Ward (1875), 5 Oreg. 450; Shaffer v. Lee (1850), 8 Barb. 412; Ennis v. Buckeye Pub. Co. (1890), 44 Minn. 105; and in these cases it seems equally clear that the damages would be so speculative as to give equity jurisdiction. Other courts require that successive suits be brought for each accruing injury. Terry v. Beatrice Starch Co. (1895), 43 Neb. 866; Hunt v. Tibbetts (1879), 70 Me. 221, and here the jurisdiction could be sustained to avoid multiplicity of actions. Shimer v. Morris Canal Co. (1876), 27 N. J. Eq. 364; Penn. Coal Co. v. Del. Canal Co. (1865), 31 N. Y. 91. It would seem therefore that where actual damages are suffered equity will take jurisdiction not because the contract is negative, but because of the inadequacy of legal remedy. In the principal case, however, the defendant offered to prove that there had been no actual financial loss. In such a case the plaintiff in law would be entitled to a judgment for nominal damages. Sedgwick on Damages, 8th Ed., § 98; Deere v. Lewis (1869), 51 Ill. 254, and as such a judgment will not prevent a suit for subsequent actual damages, Sedgwick, *supra*, § 642, the legal remedy would seem amply adequate, and equitable jurisdiction would have to rest on a ground peculiar to these cases.

Where real estate is involved, equity takes jurisdiction regardless of the question of damages. Fry, *supra*, p. 13, note. Hodges v. Kowing (1889), 58 Conn. 12. There is little doubt, however, that when land is in dispute the unique nature of the subject-matter in a large majority of cases makes legal damages inadequate and speculative, and it would seem that even in this class of cases it is the imperfection of the legal remedy that gives the jurisdiction. Fry, *supra*, pp. 607 note, 34 note. It is hard to conceive of equity granting specific performance of a contract to convey land in a case where the complainant admitted that he bought the land only for speculation and that his only loss was a liquidated amount, due to a rise in the market value of the land. See Richmond v. Railroad Co. (1871), 33 Iowa, 422; Townsend v. Vanderwerker (1891), 20 D. C. 197. Similarly, in unilateral contracts containing a negative covenant it is said that the plaintiff should be entitled to specific performance of the promise because he has given a consideration; but the plaintiff's performance is valuable only to negative the lack of mutuality so frequently found in these cases. Lindsay v. Warnock (1894), 93 Ga. 619; Welch v. Whelpley (1886), 62 Mich. 15, and to give it a greater effect would seem to go too far. See 4 Columbia Law Review, 61. The principal case seems to go beyond any decided case, though it has the support of *dicta* in several decisions and follows an authoritative writer. Professor Langdell in 1 Harvard Law Rev. 383.—*Columbia Law Review.*

THE CONTROL OF THE COURTS OVER THE INTENT OF THE LEGISLATURE.

When the highest court in perhaps the leading American state boldly deserts a line of reasoning which heretofore it has announced to be the settled doctrine in a large number of carefully considered cases and by

the same decision overrules the manifest intent of the legislative act passed in presumable reliance upon those decisions, in order to secure what it considers substantial justice, the decision is well worth careful study. This the Court of Appeals of New York has done in Griffin v. Interurban Street Railway Co., 72 N. E. Rep. 513, a case relating to the imposition of cumulative penalties. In this case the charter of the company imposed as a condition where different street railways were consolidated, that free transfers should be given within certain defined limits in the city of New York. The legislature imposed a penalty of $50 "for every refusal" of such transfer. The plaintiff Griffin, having been refused transfers at four different times, brought suit for $200. The court, by Bartlett, J., after referring to People v. New York C. R. R., 13 N. Y. 78; Suydam v. Smith, 52 N. Y. 383, and Grover v. Morris, 73 N. Y. 473, where under similar wordings cumulative penalties had been allowed, said:

"It is quite obvious that the legislative intention to permit the recovery of cumulative penalties for refusals of the defendant to comply with provisions of the railroad law in regard to the transfer of passengers is as clearly manifested as in any of the cases cited. Notwithstanding this fact, a majority of my brethren are of the opinion that while the rule for the recovery of cumulative penalties, as already adverted to, is firmly established by the earlier decisions of the court, yet the changed conditions in our modern life in great cities render its modification imperative. * * * The court is of the opinion that if cumulative remedies are to be permitted, the legislature should state its intention in so many words; that a more definite form of statement should be substituted for the words hitherto deemed sufficient."

The court accordingly held that only one penalty could be recovered, and that by bringing action on one transfer, all similar causes of action previously acquired were waived. The reason given for the change of policy is that actions of this nature had become highly speculative in character, and that well-nigh appalling losses would be inflicted upon these and other defendants if the policy were to be continued.

The case presents itself from two points of view: that of the doctrine of *stare decisis*, and that of conflict between the legislative and judicial departments of government, and in either of these it is doubtful whether the court of appeals can find decisions in support of the position it has taken. The doctrine of *stare decisis* seems to be thoroughly incorporated into the fabric of American law, and only recently has its authority been seriously questioned. Some American courts, indeed have carried the doctrine to extremes, as is illustrated in Gray v. Gray, 34 Ga. 499. There the court says: "When a question has once been decided in this court we desire it to be distinctly understood that such a decision is with us authority. We deem it of great importance that the decisions of this court should, as a general rule, be uniform." And the Supreme Court of the United States has taken a position nearly as decisive, when a case has been uniformly decided in the same way a number of times. Wright v. Sill, 2 Black (U. S.), 544. See also Davidson v. Biggs, 61 Iowa, 309.

Although legislative attempts to infringe upon the line which separates the legislative from the judicial functions of government have not been infrequent, the courts have almost uniformly manifested great care lest they should infringe upon the duties apportioned to the other departments. They have always adopted as a cardinal rule the principle that when the language of the statute is plain and unambiguous, the expressed intention of the legislature must prevail, and that the wisdom, expediency or good faith of that body are not matters for judicial inquiry. 1 Kent, Com. 460, 468; Opinion of the Justices, 166 Mass. 589, 595; and the consequences are not to be considered where the language is plain and unambiguous. State v. Franklin City S. B. & T. Co., 74 Vt. 246; Louisville & Nashville R. R. v. Com., 104 Ky. 226.

These principles are too familiar, and the cases which support them too numerous, to need further illustration, but in view of the decision cited, they would seem to deserve new consideration, since it is not to be assumed that a court of the importance of the Court of Appeals of New York rendered its decision without carefully considering them, even though the points are not discussed in the decision. It is difficult to see how the legislative intent could have been more clearly expressed. Without doubt the losses to be sustained by the Interurban Railway and similar corporations might be appalling if the recovery of cumulative penalties were allowed, but it is to be remembered that they were in this case probably incurred in willful and deliberate violation of the law, with a full knowledge of the possible consequences. Such violations have become too common of late, and too often escape a punishment sufficient to act as a deterrent from future disregard of public rights.

Sir Henry Main, in his notable work upon Ancient Law, in commenting upon the fact that the jurisprudence of the Greeks left no impression upon the systems of later times, ascribed as a reason that, as in this case, the facts were allowed to influence and control the rigid rules of law. "No durable system of jurisprudence," he says, "could ever be produced in this way. A community which never hesitated to relax rules of the written law whenever they stood in the way of an ideally perfect decision on the facts of a particular case, would only, if it bequeathed any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted." It is apparent that in the United States, owing to the vast number of state courts, every effort should be made to bring at least the adjective l w into some semblance of uniformity, and that rule long established should not be varied without the most powerful reasons, since every deviation must cause a multitude of embarrassments to the courts themselves. It is hoped that the policy of the New York court, as evidenced in this decision, will not be followed.—*Yale Law Journal.*

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE, VOL. 16.

No work of equal magnitude has been published with such promptness as the Cyclopedia of Law and Procedure, the 16th volume of which work is now on our desk for review. This volume maintains the unusually high standard set by the earlier volumes and, in point of importance, so far as the subject-matter is concerned, is not second to any of the previous volumes.

In this volume two large and perplexing subjects are reduced to a convenient working form, and th principles are enunciated with great clearness an

force. Within moderate space the principles of "Equity" and "Evidence" are set out with the clean cut incisive method of an intelligent and effective brief.

The selection of the distinguished scholar and expert, Professor Frank Irvine, of the Cornell University College of Law, to write "Equity" was singularly fortunate and felicitous. An acknowledged authority on modern equity and one of its foremost interpreters in legal literature Professor Irvine has brought out in a strong and effective light this intricate portion of the science so as to command the recognition of the entire American and English bench and bar. "Equity" comprises 534 compact and well-freighted pages.

Of equal dignity, rank and importance with "Equity" the article on "Evidence" is one of the strongest, most elaborate, reliable and useful contributions to American and English law. At the first blush it would seem that a topic which was illustrated in three ponderous volumes by Greenleaf, which has been attempted but recently in a work of nearly four thousand pages, could not be fully and intelligently treated within the ordinary space allotted to these series of text books. But a careful examination of that portion of the work which appears in this volume establishes clearly the fact that the task essayed by the authors and editors has been fulfilled with the highest degree of success. The name of Melville M. Bigelow is so closely indentified with the subject of "Estoppel" that the mention of it in connection with the article is a guarantee of a standard production. And such is the fact. Other articles of importance considered in this volume are "Escrows" by Ernest H. Wells; "Estates" by James A. Gwyn; and 'Escape," by S. R. Wrightington.

Published by the American Law Book Co., New York.

HUMOR OF THE LAW.

The Lawyer—"Do you want a divorce without publicity?"

The Lady—"Sir, you seem to have forgotten that I am an actress!"—*Chicago Daily News.*

"I haven't seen your cashier for several days."

"No; he's gone out of town."

"Gone for a rest, I suppose."

"We haven't found out yet whether he's gone for a rest or to escape it."—*Philadelphia Record.*

"If yoh husband beats you, mebbe you kin hab him sent to de whippin'-pos'," said Mrs. Potomac Jackson.

"If my husban' ever beats me," said Mrs. Toliver-Grapevine, "dey kin send him to de whippin'-pos' if dey wants to. But dey'll have to wait till he gits out'n de hospital."—*Washington Star.*

A witness who had given his evidence in such a way as satisfied everybody in court that he was committing perjury, being cautioned by the judge, said at last:

"My lord, you may believe me or not, but I have not stated a word that is false, for I have been wedded to truth from my infancy."

"Yes, sir," said Sir William Maule; "but the question is, how long have you been a widower!"

An English lawyer was cross-examining the plaintiff in a breach of promise case. "Was the defendant's air, when he promised to marry you, perfectly serious or one of jocularity?" he inquired.

"If you please, sir," was the reply, "it was all ruffled with 'im a-runnin' 'is hands through it."

"You misapprehend my meaning," said the lawyer. "Was the promise made in utter sincerity?"

"No, sir, an' no place like it. It was made in the wash'ouse an' me a wringin' the clothes," replied the plaintiff.—*Harpers' Weekly.*

A janitress at work in the office of a young attorney, came into his private room to ask advice, saying that she would pay whatever it was worth. After hearing her story of how she had been buying her household furniture on the installment plan, how she had learned, when too late, that the range would not bake, and how the dealer, refusing to make it "good," threatened to seize everything under his contracts, the young attorney advised her what to do, and explained the course she had to follow. The next day her small son came in with the message—"Maw says yous owes her forty cents for 'scrubben out,' 'nd says to take what she owes yous for what yous told hern, out o' it, 'nd to guve me the rest."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABORTION—Evidence—Administering Drugs.—In a prosecution for administering drugs to a pregnant female to produce an abortion, evidence of others that defendant procured them to carry medicine to prosecutrix held admissible.—Burris v. State, Ark., 84 S. W. Rep. 723.

2. ACCIDENT INSURANCE—Intentional Injury.—Where deceased died from a shot fired by third persons while he was in custody of officers, such death was caused by intentional injuries inflicted by another within an exception of an accident policy.—Jarnagin v. Travelers' Protective Association of America, U. S. C. C. of App., Sixth Circuit, 133 Fed. Rep. 892.

3. ACCIDENT INSURANCE—Sub-Agent—Authority to Accept Note for Premium.—A sub-agent of insurer held without authority to accept insured's note for the first premium and thereby waive a provision of the policy requiring payment in cash.—Pennsylvania Casualty Co. v. Union, U. S. C. C. of App., Second Circuit, 133 Fed. Rep. 907.

4. ACCOUNT STATED—Sale—Action for Price.—Where the debtor objected, when the account was rendered, that the account should be charged to a corporation of which he was manager, instead of to him individually, the creditor cannot claim an account stated, on the ground that the debtor did not object to the amount.—Love v. Ramsey, Mich., 102 N. W. Rep. 279.

5. ADVERSE POSSESSION—Elements of Possession.—One who holds land adversely, but without paper color of title, holds only that land which he has reduced to actual possession.—Chastang v. Chastang, Ala., 37 So. Rep. 799.

6. ADVERSE POSSESSION—Tacking—Color of Title.—The possession of trespassers cannot be tacked to the possession of subsequent claimants under color of title, so as to make out possession for the statutory period.—Haggart v. Ranney, Ark., 84 S. W. Rep. 703.

7. ADVERSE POSSESSION—Use by Owner and Others.—Title by adverse possession held not acquired, where land is used equally by persons having the paper title and others.—Spencer Christian Church's Trustees v. Thomas, Ky., 84 S. W. Rep. 750.

8. ALTERATION OF INSTRUMENTS—Acknowledgment.—Attaching false acknowledgment to a contract employing a broker to sell land, and the signing of the agreement by the broker and a witness without the owner's knowledge after execution, are not material alterations.—Canfield v. Orange, N. Dak., 102 N. W. Rep. 313.

9. ANIMALS—Infectious Diseases.—Act Congress June 3, 1902, ch. 985, 32 Stat. 289, conferring certain powers on the Secretary of Agriculture with reference to diseased animals, held not to confer on the secretary any jurisdiction over animals free from or which had not been exposed to an infectious or contagious disease.—United States v. Hoover, U. S. D. C., D. Neb., 133 Fed. Rep. 950.

10. ANNUITIES—Judicial Sale—Land Charged With Annuities.—Effect of judicial sale of land charged with arrearages for annuity determined, and the land held subject to charge for future arrearages after sale.—Walters v. Steel, Pa., 59 Atl. Rep. 821.

11. APPEAL AND ERROR—Additional Record.—A rehearing held not to be granted on points based on an additional record which was filed after appellant's abstract and brief, and did not come to the court's notice.—Eustace v. People, Ill., 72 N. E. Rep. 1089.

12. APPEAL AND ERROR—Appealable Orders—Sequestered Property.—An order authorizing the sheriff to release property of a firm, sequestered at suit of one of the partners, on defendant furnishing bond, held subject to appeal.—Boimare v. St. Geme, La., 37 So. Rep. 770.

13. APPEAL AND ERROR—Assignments of Error.—In an action for injuries to a passenger, refusal of two requests to charge on different matters cannot be grouped in a single assignment of error.—Chicago, R. I. & P. Ry. Co. v. Cain, Tex., 84 S. W. Rep. 682.

14. APPEAL AND ERROR—Attorney's Purchase of Client's Land.—A sale of land by an executor through his attorney held brought about owing to such conduct on the part of the attorney that the executor would be relieved in equity.—Thweatt v. Freeman, Ark., 84 S. W. Rep. 720.

15. APPEAL AND ERROR—Damages.—A judgment in an action for personal injuries will not be reversed for error in an instruction allowing punitive damages, where the judgment does not exceed the amount to which plaintiff is entitled.—Bradford v. Taylor, Miss., 37 So. Rep. 812.

16. APPEAL AND ERROR—Discretion of Court.—The findings of the chancellor, made after he has heard the witnesses in open court, will not be disturbed on appeal, unless they are clearly against the weight of the testimony.—Evans v. Woodsworth, Ill., 72 N. E. Rep. 1082.

17. APPEAL AND ERROR—Jury Verdict—Equity Case.—While the verdict of the jury in an equity case is merely advisory to the court, yet, when such verdict supports the court's findings, the Supreme Court will be very reluctant to reverse them.—Thompson v. Hardy, S. Dak., 102 N. W. Rep. 299.

18. ARMY AND NAVY—Effect of Acquittal by Civil Tribune.—Acquittal of a soldier of murder and included offenses committed during a military encampment held no bar to his subsequent trial for conduct to the prejudice of military discipline in violation of the sixty-second article of war. U. S. Comp. St. 1901, p 957, based on the same acts.—*In re* Stubbs, U. S. C. C., D. Wash., 133 Fed. Rep. 1012.

19. ATTACHMENT—Title Acquired at Sheriff's Sale.—A purchaser of real estate at sheriff's sale under attachment acquires no title as against a deed delivered before the levy of the attachment, but recorded after the attachment and before the judgment, under Comp. Laws, § 3294.—Leonard v. Fleming, N. Dak., 102 N. W. Rep. 808.

20. BANKRUPTCY—Building and Loan Associations.—Dues and fines payable before suspension of business by a building and loan association held, in a suit to foreclose the mortgage of a member, to be considered part of the mortgage debt.—Mercantile Co-operative Bank v. Goodspeed, N. J., 59 Atl. Rep. 802.

21. BANKRUPTCY—Conversion.—An allegation in an alias body execution on a judgment for conversion, under V. S. 1751, held insufficient to establish that the property converted was obtained by false pretenses or false representations, within Bankr. Act, § 17a, cl. 2.—*Ex parte* Peterson, Vt, 59 Atl. Rep. 828.

22. BANKRUPTCY—Discharge—Insanity of Bankrupt.—The insanity of a bankrupt, although it has prevented his examination by creditors, is not a bar to his discharge.—*In re* Miller, U. S. D. C., E. D. Pa., 133 Fed. Rep. 1017.

23. BANKRUPTCY—Failure to Apply for Discharge.—Where a bankrupt failed to apply for a discharge within the time limited, his right to a discharge is *res judicata*, and barred him from obtaining a discharge in subsquent proceedings from debts provable in the former.—*In re* Weintraub, U. S. D. C., D. N. J., 133 Fed. Rep. 1000.

24. BANKRUPTCY—Fraudulent Transfers.—In proceedings by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt, the burden is on defendants to show that they are *bona fide* purchasers for value.—Lawrence v. Lowri, U. S. D. C., M. D. Pa., 133 Fed. Rep. 995.

25. BANKRUPTCY—Landlord's Lien.—Where property of a bankrupt subject to a landlord's lien was sold under an agreement with the trustee that the lien should attach to the fund derived therefrom, the lien was preserved for the benefit of the landlord.—*In re* Bourlier Cornice & Roofing Co., U. S. D. C., W. D. Ky., 133 Fed. Rep. 958.

26. BANKRUPTCY—Partnership—Individual Assets.—Where a bankrupt firm had no assets, and both partners were insolvent, the entire individual estate of one of the partners was applicable to his individual creditors.—*In re* Janes, U. S. C. C. of App., Second Circuit, 133 Fed. Rep. 912.

27. BANKRUPTCY—Preferences.—In an action by a bankrupt's trustee to recover an alleged preference, evidence held sufficient to charge the preferred creditors with notice that the bankrupt was insolvent at the time the conveyance was executed.—Crandall v. Coats, U. S. D. C., N. D. Iowa, 133 Fed. Rep. 965.

28. BANKRUPTCY — Preferences. — In an action by a trustee in bankruptcy to recover an alleged preference, evidence held sufficient to require submission to the jury of the question whether the preferred creditor had reasonable cause to believe that it was intended thereby to give a preference.—Wetstein v. Franciscus, U. S. C. C. of App., Second Circuit, 133 Fed. Rep. 900.

29. BANKRUPTCY—Statute—Construction.—Bankr. Act, § 17, cl. 4, relative to the operation of a discharge, held, in view of similar provisions of the acts of 1841 and 1867, to include within the term "officer" officers of private corporations.—*In re* Harper, U. S. D. C., W. D. Va., 133 Fed. Rep. 970.

30. BANKRUPTCY—Voidable Preferences.—Bankr. Act, § 67, subd. e, held inapplicable to a preferential transfer by a bankrupt not made within four months prior to the filing of the petition, or with intent to defraud his creditors.—Little v. Holley-Brook's Hardware Co., U. S. C. C. of App., Fifth Circuit, 133 Fed. Rep. 874.

31. BILLS AND NOTES—Check—Delay in Presentment. —Where the drawee of a check has been discharged from liability on his indorsement by delay of the indorsee in presentment until the check is lost, the drawee does not waive the indorsee's delay and renew his obligation as indorser by procuring and indorsing a duplicate. —Aebi v. Bank of Evansville, Wis., 102 N. W. Rep. 329.

32. BILLS AND NOTES—Forged Draft—Delay in Notifying Bank.—Drawee of a forged draft, who had paid the same to a bank that had discounted and indorsed it, held not precluded from recovering from the bank by *laches*.—La Fayettte & Bro. v. Merchants' Bank, Ark., 84 S. W. Rep. 700.

33. BREACH OF THE PEACE—Colliding Vehicles.—Defendant being charged with intentionally driving his wagon against prosecutrix's carriage, evidence of prior threats by defendant to run into prosecutrix held admissible on the issue of intent.—State v. Atkins, Vt., 59 Atl. Rep. 826.

34. BROKERS—Compensation—Owner Refusing to Convey.—Where an owner of land employs a broker to sell he same, and on production of a purchaser refuses to onvey, the measure of the broker's loss is his profit.— Canfield v. Orange, N. Dak., 102 N. W. Rep. 313.

35. BUILDING and LOAN ASSOCIATIONS—Misrepresentations of Law.—Representations of officers of building and oan association as to the provisions of the contract held not fraudulent, because such provisions were subsequently declared by the courts to be valid.—Hough v. Maupin, Ark., 84 S. W. Rep. 717.

36. CARRIERS—Act of God—Concurring Negligence.— In an action for injuries to a passenger, the carrier is liable where its negligence concurred with an act of God to cause the injury.—Chicago, R. I. & P. Ry. Co. v. Cain, Tex., 84 S. W. Rep. 682.

37. CHATTEL MORTGAGE—Assignment of Debt.—The assignee of a debt secured by chattel mortgage cannot replevy the property under the mortgage without an assignment of it to him.—Perry County Bank v. Rankin, Ark., 84 S. W. Rep. 725.

38. CONDEMNATION—Delay in Proceedings.—A delay of 15 months between the entry of judgment in condemnation proceedings and the election by the city to abandon the proceedings is *prima facie* unreasonable.—Winkelman v. City of Chicago, Ill., 72 N. E. Rep. 1066.

39. CONSTITUTIONAL LAW — Contract Obligation. — Remedies made the subject of contracts cannot be impaired by subsequent legislation.—Weist v. Wuller, Pa., 59 Atl. Rep. 820.

40. CONSTITUTIONAL LAW—Local Improvements—Due Process of Law.—Local Improvement Act § § 42, 86 (Hurd's Rev. St. 1903, pp. 400, 412), held not void as depriving the owner of his property without due process of law.—Hulbert v. City of Chicago, Ill., 72 N. E. Rep. 1097.

41. CONSTITUTIONAL LAW—Police Power.—An ordinance, pursuant to Dallas City Charter, § 113, requiring the tracks of railroads to be constructed at grade on crossings, is in the exercise of the police power, and hence is not an ordinance taxing property without due process of law.—Houston & T. C. Ry. Co. v. City of Dallas, Tex., 84 S. W. Rep. 648.

42. CONSTITUTIONAL LAW—Wills—Evidence as to Testamentary Capacity.—Statute of wills, limiting the evidence of testamentary capacity admissible on an application for probate of a will, held not unconstitutional as depriving contesting heirs of their property without due process of law.—O'Brien v. Bonfield, Ill., 72 N. E. Rep. 1090.

43. CONTRACTS—Counties—Erection of Courthouse.— Contract approved by county judge, providing in effect for erection of new courthouse, could not be sustained on theory of repairs to old courthouse.—Bowman v. Frith, Ark., 84 S. W. Rep. 709.

44. CONTRACTS—Estoppel.—One who contracts on behalf of himself and another is estopped to deny the right of the other, although he made the contract in his own name alone.—Murphy v. Smith, Walker & Co., Tex., 84 S. W. Rep. 678.

45. CONTRACTS — Substantial Performance — Quantum Meruit.—The measure of a contractor's right to recover on a contract which he has in good faith substantially performed is not the contract price.—Manning v. School District No. 6 of Ft. Atkinson, Wis., 102 N. W. Rep. 356.

46. CORPORATION — Estoppel of Dissenting Stockholder.—A dissenting stockholder in corporation held entitled to enjoin prosecution of action on a contract made by majority stockholders with the corporation until termination of his suit.—Booth v. Land Filling & Imp. Co., N. J., 59 Atl. Rep. 767.

47. CORPORATIONS—Liabilities—Acts of Officers.—A corporation is not liable in damages for acts of its officer outside of the scope of his employment.—Bright v. Bell, La., 37 So. Rep. 764.

48. COSTS—Good Faith in Prosecuting Action.—The fact that plaintiff has prosecuted his suit in good faith is not ground for exempting him from the payment of costs in the Supreme Court and in the court below, on being finally defeated in the former court.—Pietech v. Milbrath Wis., 102 N. W. Rep. 342.

49. COSTS—Reconventional Demand.—Where there is a reconventional demand, and both parties are cast, each must pay the cost occasioned by the demand of the other. —Hunter Canal Co. v. Robertson's Heirs, La., 37 So. Rep. 771.

50 COVENANTS — Building Line Restrictions — Bay Windows.—A bay window, built up from a foundation wall, must be considered as "the house," within a building restriction covenant.—Righter v. Winters, N. J., 59 Atl. Rep. 770.

51. COVENANTS—Conveyance—Nonjoinder of Wife.— A conveyance of a homestead without the wife's joinder being void, the warranty clause therein creates no estoppel against the vendor, even after the wife's death. —Bollen v. R. G. Lilly & Son., Miss., 37 So. Rep. 811.

52. CRIMINAL TRIAL—Continuance—Absent Witness.— Error in refusing a continuance in a criminal case held not cured by an admission of the district attorney that the witness, if present, would testify to the contents of the application.—Caldwell v. State, Miss., 37 So. Rep. 816.

53. CRIMINAL TRIAL—Homicide—Rulings on Rebuttal Testimony.—The exclusion, after admission, of testimony of the state's attorney fortifying that of a witness, did not cure the error in admitting such testimony.— Flowers v. State, Miss., 37 So. Rep 814.

54. CRIMINAL TRIAL—Jurisdiction—Murder Case.—In case of an indictment returned by a special grand jury, the necessary steps to give the court jurisdiction held presumed to have been taken.—Frame v. State, Ark., 84 S. W. Rep. 711.

55. CRIMINAL TRIAL—Remarks by Court.—A conviction will not be reversed because the trial judge, in sustaining an objection to evidence, gives his recollection of what a witness had testified to.—State v. Golden, La., 37 So. Rep. 757.

56. CRIMINAL EVIDENCE—Sufficiency—Homicide.—It is not error to charge that "the state claims that there is some evidence tending to prove" certain facts, where there is a basis in the evidence for such claim.—Holmes v. State, Wis , 102 N. W. Rep. 321.

57. DAMAGES—Pecuniary Standing of Plaintiff.—In an action for injuries to an employee not resulting in death, it was not permissible to show his habits of industry.—Davis v. Kornman, Ala., 37 So. Rep. 789.

58. DEEDS—Conveyance by Heirs.—A deed of certain children, purporting to convey a mere expectancy in certain land held by their father, then living, held void.—Furnish's Admr. v. Lilly, Ky., 84 S. W. Rep. 734.

59. DOWER—Conveyances by Heirs.—Deed by certain heirs to L held to convey the rights of the male grantors, subject to the dower rights of their wives, who did not join therein.—Furnish's Admr. v. Lilly, Ky., 84 S. W. Rep. 734.

60. EQUITY — Laches — What Constitutes. — What will constitute *laches* in a given case depends upon the discretion of the court, and unless that discretion is abused it will not be interfered with.—Evans v. Woodsworth, Ill., 72 N. E. Rep. 1082.

61. EQUITY—"No Wrong Without a Remedy."—An injury which the written law renders a nonactionable wrong, or not a wrong at all, is not within the maxim that "there is no wrong without a remedy."—Pietsch v. Milbrath, Wis., 102 N. W. Rep. 342.

62. ESTOPPEL—How Created.—An equitable estoppel is not created without a change in the situation of one of the parties in reliauce on the deeds or statements of the other, followed by damage.—Hougen v. Skjervheim, N. Dak , 102 N. W. Rep. 311.

63. EVIDENCE—Adverse Possession—Tax Receipts.—A tax receipt held not self-proving, unless it is an ancient document.—Chastang v. Chastang, Ala., 37 So. Rep. 799.

64. EVIDENCE—Appointment of Executor.—Where a dative testamentary executor has been appointed by the clerk of a district court sitting for a parish in which the will has not been proved or registered, the appointment will be vacated on appeal.—Succession of Henry, La., 37 So. Rep. 756.

65. EVIDENCE — Boundaries — Calls of Patent. — The location of the boundaries of land as shown by calls in the patent, cannot be overthrown by parol evidence as to the surveyor's statement, before making the survey, as to a monument that he would take for a beginning corner.—Ratliff v. May, Ky., 84 S. W. Rep. 731.

66. EVIDENCE—Letters.—A letter held not objectionable, because not shown to have been in the handwriting of the person whose correspondence it purported to be.—Sun Mfg. Co. v. Egbert & Guthrie, Tex., 84 S. W. Rep. 667.

67. EVIDENCE—Requiring Production of Books.—The court will require a plaintiff to produce a book alleged by defendant to be material to the issues, in order that the questions raised thereon may be fully presented.—Dun v. International Mercantile Agency, U. S. C. C , S. D. N. Y., 133 Fed. Rep. 1004.

68. EVIDENCE—Res Gestæ—Statement to Physician.—A statement by one injured to her physician that the injury was caused by a fall on defendant's toll bridge held not admissible as *res gestæ* in an action for the injury.—Shade's Admr. v. Covington-Cincinnati Elevated R. & Transfer & Bridge Co., Ky., 84 S. W. Rep. 733.

69. EVIDENCE — Sales — Implied Warranty — Electric Light Plant.—In an action for the price of an electric light plant, it was proper to permit plaintiff to ask his expert witness as to the character of the dynamo and how many lights it was expected to furnish.—Kernan v. Crook, Horner & Co., Md., 59 Atl. Rep. 753.

70. EVIDENCE—Statement of Employee.—Statements of an employee as to the character of his principal's work, not made while he is authorized to represent the principal, are not proper evidence against him.—Manning v. School Dist. No. 6 of Ft. Atkinson, Wis., 102 N. W. Rep. 356.

71. EXCHANGE OF PROPERTY—Materiality of Misrepresentation.—False representation as to the time within which plaintiff could obtain possession of property which he was to obtain in exchange for his farm held a material misrepresentation.—Thompson v. Hardy, S. Dak., 102 N. W. Rep. 299.

72. EXTRADITION—Great Britain—Treaty Stipulations.—An information in extradition proceedings charging accused with "assault with intent to kill and murder" sufficiently brings the offense within article 10 of the treaty with Great Britain, authorizing extradition of persons charged with "assault with intent to commit murder."—United States v. Plaza, U. S. D. C., W. D. N. Y., 133 Fed. Rep. 998.

73. FEDERAL COURTS—Diverse Citizenship—Sufficiency of Petition.—A petition in the federal court alleging diversity of citizenship held sufficient to sustain federal jurisdiction without an allegation that either party resided within the district.—Baltimore & O. R. Co. v. Doty, U. S. C. C. of App., Sixth Circuit, 133 Fed. Rep. 866.

74. FEDERAL COURTS—Habeas Corpus.—Petitioners held properly discharged on *habeas corpus* by a federal court from imprisonment by a state for murder on account of the killing of a man while acting as members of a posse *comitatus* called to assist in his arrest on a *capias* issued by said federal court.—State of West Virginia v. Laing, U. S. C. C. of App., Fourth Circuit, 133 Fed. Rep. 887.

75. FERRIES—Licenses—Littoral Rights.—A riparian owner held entitled to an injunction restraining an operator of a ferry, who had not procured the license required by Rev. St. 1895, art. 4798, and who had no valid permission to use the land, from landing the ferry there.—Parsons v. Hunt, Tex., 84 S. W. Rep. 644.

76. FIRE INSURANCE — Proofs of Loss.—Failure to furnish a certificate of a justice of the peace to insurer in a fire policy held no bar to an action on the policy.—Norris v. Equitable Fire Assn., S. Dak., 102 N. W. Rep. 306.

77. FRAUDS, STATUTE OF—Conveyances—Ferry Landing.—A continuing right to use land for a landing place for a ferry is within Rev. St. 1895, art. 624, providing that no estate of inheritance shall be conveyed, except by an instrument in writing.—Parsons v. Hunt, Tex., 84 S. W. Rep. 644.

78. FRAUDS, STATUTE OF—Promise to Answer Debt of Another.—A verbal agreement by defendant to repay plaintiff advancements made to loggers pending a transfer of a contract and property to defendant held not a promise to answer for the debt of another, within the statute of frauds, Rev. St. 1898, § 2307, subd. 2, which is void, if not in writing.—McCord v. Edward Hines Lumber Co., Wis., 102 N. W. Rep. 334.

79. GARNISHMENT—Parties.—Where plaintiff appealed from a judgment in garnishment in the municipal court in favor of an intervening claimant, but neither the garnishee nor defendant took any part therein, they were not necessary parties.—Peterson v. Knuutila, Minn., 102 N. W. Rep. 368.

80. GIFTS—Conditioned on Future Support.—An act of a married man and his wife, by which he devested himself of all of his property in consideration of promise of future support, held null and void.—Harris v. Wafer, La., 37 So. Rep. 768.

81. GUARDIAN AND WARD—Sale of Property Without Advertsing.—Under Ky. St. 1903, § 14a, an infant may, with the chancellor's approval, consent, through his statutory guardian, to a judicial sale of his real estate without newspaper advertisement.—Hieatt v. Schmidt, Ky , 84 S. W. Rep. 740.

82. HIGHWAYS—Conveyance of Old Road.—Where the same person owned the land on both sides of a road closed by the county commissioners, such person was authorized to inclose the road and appropriate the land over which it ran to his own use, after a conveyance of

the bed of the road to him by the county commissioners. —Jenkins v. Riggs, Md., 59 Atl. Rep. 758.

83. HOMESTEAD—Mechanics' Liens.—A provision in a contract for the erection of a house on a homestead, giving an attorney's fee on foreclosure of a mechanics' lien, held invalid.—Summerville v. King, Tex., 84 S. W. Rep. 648.

84. HOMICIDE—Assault—Self-Defense.—An affray in which defendant was ejected from the premises where his antagonist was working did not justify defendant in shooting his antagonist after they had entirely separated and were moving apart —Holmes v. State, Wis., 102 N. W. Rep. 321.

85. HOMICIDE—Cause of Death.—It is no defense in a prosecution for homicide, that the immediate cause of the death of the deceased was a disease resulting from a germ entering the womb.—Bishop v. State, Ark., 84 S. W. Rep. 707.

86. HOMICIDE—Justification.—That deceased, superintendent of machinery of a railroad, had failed to return to defendant his letters of recommendation and had placed his name on the "black list," held not to justify defendant in killing deceased.—Warner v. Commonwealth, Ky., 84 S. W. Rep. 742.

87. HOMICIDE—Self-Defense—Duty to Retreat.—Where the overt act is proved, it is for the jury to determine whether the accused "retreated to the wall," or whether it was his duty to resort to other means of defense than the killing of his adversary.—State v. Golden, La., 37 So. Rep. 757.

88. HOMICIDE—Self-Defense—Reasonable Apprehension.—A pressing necessity to the apprension of the person assaulted does not justify him in killing his assailant, unless there is also a reasonable ground to believe that such necessity exists.—Holmes v. State, Wis., 102 N. W. Rep. 321.

89. HUSBAND AND WIFE—Community of Possession in Personalty.—When a husband and wife, living together have a community of possession of property, the legal title to which is in the wife, possession of such property will be referred to the title —Anglin v. Thomas, Ala., 37 So. Rep. 784.

90. HUSBAND AND WIFE—Conveyances by Heirs.—Where a conveyance by certain female heirs of their interest in certain land to their brother was void, their share of the proceeds of a sale of the land should be charged with the amount received for the conveyance. —Furnish's Admr. v. Lilly, Ky., 84 S. W. Rep. 734.

91. HUSBAND AND WIFE—Corporate Stock in Husband's Name.—A wife, who allows corproate stock owned by her to stand on the corporate books in the name of her husband, has the burden of showing that no fraud or injury resulted to her husband's creditors.—Magerstadt v. Schaefer, Ill., 72 N. E. Rep. 1063.

92. HUSBAND AND WIFE—Fraudulent Conveyance.—Personal property bought by a wife with the proceeds of real property, which as to creditors belong to her husband, may be subjected to the lien to which the proceeds of the real property would have been subject.—Mertens v. Schlemme, N. J., 59 Atl. Rep. 808.

93. HUSBAND AND WIFE—Joint Tenancy—Survivorship. —Where husband and wife held joint title to farm, contract and will executed by husband alone held to pass no title.—Hubert v. Traeder, Mich., 102 N. W. Rep. 283.

94. INJUNCTION—Discovery.—Attorney held entitled to injunction restraining a client from prosecuting an action against him, pending a discovery by the client of the attorney's accounts and vouchers in her possession. —Shaw v. Frey, N. J., 59 Atl. Rep. 811.

95. INTOXICATING LIQUORS—Civil Damage Act.—In an action under the civil damage act, cross-examination of plaintiff as to her husband's earnings and business does not entitle plaintiff to show that she has children who contribute to the earnings of the family.—Manzer v. Phillips, Mich., 102 N. W. Rep. 292.

96. JUDGMENT — Assignment. — An assignment, by agreement of all parties, by S to R, for the purpose of transferring the interest of L under an assignment to S, which had been lost, held effectual.—Snyder v. Malone, Wis., 102 N. W. Rep. 354.

97. JUDGMENT—Finding of Material Issues.—A finding of the court within the pleadings on a material matter, and not a matter merely incidental or collateral to issues tendered thereby, is final and conclusive, and cannot be impeached in another proceeding.—*In re* Harper U. S. D. C., W. D. Va., 133 Fed. Rep. 970.

98. JUDGMENT—Power to Confess Judgment.—A power to confess judgment for rent due by the terms of a written lease does not authorize entering judgment for rent under an implied contract resulting from holding over, or under a new agreement for the renewal thereof.—Weber v. Powers, Ill., 72 N. E. Rep. 1070.

99. JUDGMENT—Res Judicata—Finality of Determination —Judgment of dismissal without prejudice held insufficient to sustain a plea of *res judicata*.—Wilson & Gray v. May Pants Co., Miss., 37 So. Rep. 813.

100. JUDGMENT—Street Improvements.—A judgment of sale for a street improvement, showing jurisdiction by appearance of the parties, held not required to make the recital in the statutory form of obtaining jurisdiction by notice.—Gage v. People, Ill., 72 N. E. Rep. 1062.

101. JUDGMENT—Suit to Enjoin Enforcement.—In order to entitle one to have a judgment at law enjoined, it must clearly appear that it will be contrary to equity to allow the judgment to be enforced.—Little Rock & H. S. W. R. Co. v. Newman, Ark., 84 S. W. Rep. 727.

102. LIFE INSURANCE — Use of Liquors.—The word "use," in a question put to an applicant for life insurance in relation to intoxicating liquors, held to mean habit or custom.—Pacific Mut. Life Ins. Co. v. Terry, Tex., 84 S. W. Rep. 656.

103. LIMITATION OF ACTIONS—Amending Petition.—An amended petition, which omits a count on a note and prays for a larger sum on the remaining causes of action, does not constitute a new cause of action, so as to affect the running of limitations.—Schmidt v. Brittain, Tex., 84 S. W. Rep. 677.

104. MARRIAGE—Inception of Relation.—Marriage relation between a man and woman held to begin when a decree of divorce was rendered in favor of the woman against a former husband.—Chamberlain v. Chamberlain, N. J., 59 Atl. Rep. 813.

105. MASTER AND SERVANT—Assumed Risk.—Where plaintiff, an employee, testified that he had informed defendant's superintendent of the defect in the machine, and was told that it would be fixed, the question of plaintiff's assumption of risk was for the jury.—Going v. Alabama Steel & Wire Co., Ala., 37 So. Rep. 784.

106. MASTER AND SERVANT—Assumed Risk.—A master held not liable for injuries to a servant caused by failure to use ordinary care to provide safe machinery and a sufficient number of competent employees.—Smith v. Armour & Co., Tex., 84 S. W. Rep. 675.

107. MASTER AND SERVANT—Injury to Brakeman—Defective Track.—A railroad brakeman does not assume a risk of injury arising from the master's failure to take ordinary care to provide a reasonably safe track, unless he knew of such failure in the discharge of his duties.—Missouri, K. & T. Ry. Co. of Texas v. Keefe, Tex., 84 S. W. Rep. 679.

108 MASTER AND SERVANT—Injury to Trainman—Defective Track.—A railroad trainman does not assume the risks of defective track conditions.—Northern Alabama Ry. Co. v. Shea, Ala., 37 So. Rep. 796.

109. MASTER AND SERVANT—Personal Injury—Dangerous Machinery.—In an action by an employee for injuries received by the breaking of a belt, testimony that belts fastened as this one was sometimes broke, and that persons had been injured thereby, with the knowledge of defendant's superintendent was admissible.—Davis v. Kornman, Ala., 37 So. Rep. 789.

110. MASTER AND SERVANT—Personal Injury while Performing Another's Work.—Where an engine hostler

changed work with a watchman whom he found in charge of an engine, and while performing the watchman's duties he was injured by falling into an insufficiently covered steam box, he was not entitled to recover.—Baltimore & O. R. Co. v. Doty, U. S. C. C. of App., Sixth Circuit, 133 Fed. Rep. 866.

111. MONEY LENT—Pleading—Advances Under Contract.—In an action on the common counts in an assumpsit for money loaned, held, that there was no variance between the pleading and plaintiff's evidence.—Murphy v. Dalton, Mich., 102 N. W. Rep. 277.

112. MONEY RECEIVED — Evidence—Competency.—In an action for money had and received, refusal to permit a member of the debtor firm, alleged to have paid money sued for to defendant, to answer whether such firm was indebted to defendant under a certain contract, held error.—J. V. Le Clair Co. v. Rogers-Ruger Co., Wis., 102 N. W. Rep. 346.

113. MORTGAGES — Redemption. — Where a mortgage note is payable on demand, the maker may pay it at any time, and the mortgage is redeemable at any time before strict foreclosure.—Kebabian v. Shinkle, R. I., 59 Atl. Rep. 743.

114. MORTGAGES—Transfer of Property.—A transfer of mortgaged lands, subject to the incumbrances, in satisfaction of the grantor's debts, to certain creditors represented by the grantee, held not to render the latter personally liable on such incumbrances.—Ray v. Lobdell, Ill., 72 N. E. Rep. 1076.

115. MUNICIPAL CORPORATION — Tax Assessment. — Where a taxpayer litigates all of assessment for a street improvement, he is liable for penalties and interest on the portion of the assessment held valid on final determination.—Power v. City of Detroit, Mich., 102 N. W. Rep. 288.

116. NEGLIGENCE—Crossing Steamer's Bow in Rowboat.—A decedent who was drowned in attempting to cross ahead of two car floats in tow on either side of a tug in full daylight, and where he had an unobstructed view, held guilty of contributory negligence, which precluded a recovery for his death.—Klutt v. Philadelphia & R. Ry. Co., U. S. C. C , E. D. Pa., 133 Fed. Rep. 1008.

117. NEGLIGENCE—Fire Sparks From Mill.—An instruction requiring defendant to use the degree of care usually used by men engaged in the same business, as distinguished from men of ordinary care, etc., held error.—Rylander v. Maursen, Wis., 102 N. W. Rep. 841.

118. NEGLIGENCE — Showing Subsequent Precaution Against Injury.—It is not permissible to show that, after an injury to an employee from a machine, precautionary measures were taken to protect other employees.—Davis v. Kornman, Ala., 37 So. Rep. 789.

119. PARTNERSHIP—Seizure of Property.—An order releasing on bond to defendant partner the property of the firm, seized at the instance of his copartner in a suit for an accounting, will be reversed, as likely to work irreparable injury.—Boimare v. St. Geme, La., 37 So. Rep. 770.

120. PATENTS—Infringement—Change of Form.—The fact that a defendant has appropriated the device of a patent and has been very successful in its sale is persuasive evidence against him on the defense of anticipation. —A. R. Milner Seating Co. v. Yesbera, U. S. C. C. of App., Sixth Circuit, 133 Fed. Rep. 916.

121. PRINCIPAL AND AGENT—Execution of Bond.—Surety company held not liable on liquor tax bond issued by clerk of its agent, subsequently signed by the agent in ignorance that the certificate had been forfeited at the time.—Cullinan v. Bowker, N. Y., 72 N. E. Rep. 911.

122. PRINCIPAL AND AGENT—Power of Attorney.—One who had given a power of attorney held personally liable on the renewal of a note executed by the attorney.—Stone v. McGregor, Tex., 84 S. W. Rep. 399.

123. PRINCIPAL AND SURETY—Certificate of Approval. —Under Rev. Civ. Code, § 880, it will be presumed, in the absence of an affirmation showing to the contrary, that a surety company, on entering into an undertaking, produced its certificate of authority to the clerk, who approved the undertaking.—Germantown Trust Co. v. Whitney, S. Dak., 102 N. W. Rep. 304.

124. PRINCIPAL AND SURETY—Contribution.—The fact that one surety pays the entire obligation does not relieve the co-surety from liability for contribution.—Wash v. D. Sullivan & Co., Tex., 84 S. W. Rep. 368.

125. PUBLIC LANDS—Quieting Title.—The president of an incorporated town may convey the land held by him in trust for the occupants, without the town authorities joining in the deed or authorizing its execution.—Thomas v. Wilcox, S. Dak., 101 N. W. Rep. 1072.

126. RAILROADS—City Ordinance—Grade Crossings.—It is no objection to a city ordinance requiring railroad tracks to be reduced at crossings to grade that it would require the roadbed also to be reduced between crossings.—Houston & T. C. Ry. Co. v. City of Dallas, Tex., 84 S. W. Rep. 648.

127. RAILROADS—Injury to Child on Track.—A child walking along a railroad track held a trespasser, to whom only as such the railroad company owed a duty.—Nashville, C. & St. L. Ry. Co. v. Harris, Ala., 37 So. Rep. 794.

128. RAILROADS—Injury to Passenger on Construction Train.—Where decedent disregarded a notice not to ride on a construction train, the company is not liable for his death, in the absence of proof that the company had knowledge of such disregard and acquiesced therein.—Pennsylvania Co. v. Coyer, Ind., 72 N. E. Rep. 875.

129. RAILROADS—Negligence—Accident at Crossing.—A street railroad company held negligent in backing engine across city street in the evening without a light on the engine or a lookout.—Illinois Cent. R. Co. v. Hays' Admr., Ky., 84 S. W. Rep. 338.

130. RAPE—Verdict—Certainty.—Where defendant was charged with rape and assault with intent to commit rape in a single count, a verdict of "guilty as charged" held not objectionable for uncertainty as to the offense of which defendant was convicted.—James v. State, Wis., 102 N. W. Rep. 320.

131. RECEIVERS—Appointment.—Where plaintiffs were entitled to a lien on certain hay, under Rev. Civ. Code, § 2153, the fact that defendant was not insolvent did not preclude the court from appointing a receiver to preserve the lien.—Woodford v. Kelley, S. Dak., 101 N. W. Rep. 1069.

132. REFORMATION OF INSTRUMENTS — Parties.—In a suit to reform a deed, where the title of grantee has been acquired by complainants without warranty, such grantee is not a necessary party.—Indiana River Mfg. Co. v. Wooten, Fla., 37 So. Rep. 731.

133. RELEASE—Joint Tort Feasors.—A contract between plaintiff and one of two *tort feasors* jointly sued held to constitute a covenant not to sue, and not a release discharging the other.—Robertson v. Trammell, Tex., 83 S. W. Rep. 1098.

134. RELEASE—Personal Injuries.—It is competent to show in an action at law that a release set up as a bar was obtained by fraud, without returning the consideration or filing a bill in equity.—Spring Valley Coal Co. v. Buzis, Ill., 72 N. E. Rep. 1060.

135. REWARDS—Arrest of Fleeing Murderer.—One who merely telegraphs sheriff of county where homicide occurred of arrest of the fleeing murderer held not entitled to reward, under Rev. Code 1892, § 1387.—Gould v. Chickasaw County, Miss., 37 So. Rep. 710.

136. SALES—Acceptance.—The purchaser of goods cannot accept the articles and afterwards reject them or rescind the contract.—Kernan v. Crook, Horner & Co., Md., 59 Atl. Rep. 753.

137. SALES—Breach—Loss of Profits.—Where plaintiff broke its contract to manufacture for defendants certain patented motors, defendants were entitled to recover profits lost.—Sun Mfg. Co. v. Egbert & Guthrie, Tex., 84 S. W. Rep. 667.

138. SALES—Contract to Deliver Coal.—A contract by which a coal company sold a quantity of coal to be delivered during a series of months "f. o. b. cars at the mines" did not cast upon it an obligation to provide cars, but only to be ready to load the same when supplied.—Evanston Elevator & Coal Co. v. Castner, U. S. C. C., N. D. Ill., 133 Fed. Rep. 409.

139. SALES—Inspection—Sale by Sample.—Purchasers having failed to inspect goods bought by sample within a reasonable time, held to have waived the implied warranty that the goods were similar to the sample.—Boessneck v. William Taylor & Son Co., 91 N. Y. Supp. 360.

140. SALES—Rescission.—The fact that meat sold on the market on the buyer's account was not smoked meat, whereas the meat contracted for the buyer was, held not to show a rescission of the contract of sale.—Bonds v. Thos. J. Lipton Co., Miss., 37 So. Rep. 805.

141. SALES—Standing Hay.—Under a written contract of sale of hay, held, that the title passes, though the contract provides that the hay is to be paid for before taken from the farm.—Allen v Rushfort, Neb., 101 N. W. Rep. 1028.

142. SALVAGE—Excessive Charge.—A contract to pay a tug $1,000 for the salvage of a yacht which was stranded on Coney Island Beach, where she was in danger of "sanding in" held not excessive.—The Lasca, U. S. D. C., S. D. N. Y., 133 Fed. Rep. 1005.

143. SEDUCTION—Marriage Promise.—On a prosecution for seduction, testimony of a witness held sufficient corroboration of the marriage promise.—State v. Phillips, Mo., 83 S. W. Rep. 1080.

144. SEQUESTRATION—Imperfect Performance of Contract.—Where there has been an imperfect performance of a contract for the irrigation of a rice crop, only the excess of the rent over the loss resulting from imperfect performance can serve as a basis for sequestration.—Hunter Canal Co. v. Robertson's Heirs, La., 37 So. Rep. 771.

145. SPECIFIC PERFORMANCE—Oral Contract.—A tender of consideration by the grantee in a deed held not to have rendered oral executory contract of sale a valid one, so as to entitle the vendee to specific performance.—Wisconsin & M. Ry. Co. v. McKenna, Mich., 102 N. W. Rep. 281.

146. STATUTES—Cities and Villages—Special Classification.—A *bona fide* classification of cities and villages on the basis of substantial differences in population and of the conditions growing out therefrom may be valid.—Gentsch v. State, Ohio, 72 N. E. Rep. 900.

147. TAXATION—Intent of Legislature.—Intent to impose double taxation is not to be ascribed to legislation, in the absence of clear and unambiguous expression.—First National Bank v. Douglas County, Wis., 102 N. W. Rep. 315.

148. TAXATION—Tax Sale—Accounting With Town—Liability of a county which purchases land at a tax sale, and is liable to the town to which the tax, if collected, would have belonged, determined.—Town of Spooner v. Washburn County, Wis., 102 N. W. Rep. 325.

149. TELEGRAPHS AND TELEPHONES—Diligence Required in Locating Addressee.—Though a telegram is addressed "Care some hotel," the telegraph company does not discharge its whole duty by inquiring at the various hotels in the place, if by ordinary care the addressee could be found elsewhere.—Western Union Tel. Co. v. Waller, Tex., 84 S. W. Rep. 695.

150. TOWAGE—Loss of Tow—Unseaworthiness.—The charterer of a steamship, undertaking to tow a barge from New York to Cuba, held liable for half the damage resulting from the loss of the barge and cargo by sinking due to her unseaworthy condition, where such condition was known to the master of the steamship when he started.—Dady v. Bacon, U. S. D. C., S. D. N. Y., 133 Fed. Rep. 986.

151. TRIAL—Instructions—Negligence.—The hypothesis in an instruction should be on the "reasonable satisfaction" of the jury, or "if the jury is reasonably satisfied," rather than if the jury believes that it is "probable," etc.—Going v. Alabama Steel & Wire Co., Ala., 37 So. Rep. 784.

152. TRIAL—Motion to Transfer Cause to Law Court.—Where the grounds of a motion to transfer a cause from the chancery to the law court are not established on the face of the pleadings, proof must be taken and presented to the court upon the question.—Haggart v. Ranney, Ark., 84 S. W. Rep. 703.

153. TRIAL—Trusts—Continuation in Survivor.—Where a power to sell and convey real property is conferred upon several executors or trustees, it continues to a single survivor.—Haggart v. Ranney, Ark., 84 S. W. Rep. 703.

154. TROVER AND CONVERSION—What Constitutes.—Defendant's conduct in using metal shipped it by plaintiff and repudiating contract relations with plaintiff held to constitute conversion, for which trover would lie without demand.—Great Western Smelting & Refining Co. v. Evening News Ass'n, Mich., 102 N. W. Rep. 286.

155. TRUSTS—Husband and Wife—Private Understanding.—A private understanding by which a husband held his wife's property as trustee held not to entitle the wife to treatment as a preferred creditor.—Mertens v. Schlemme, N. J., 59 Atl. Rep. 808.

156. WATERS AND WATER COURSES—Logging.—Defendant held not liable for damages caused by the overflow of a river because of logs placed therein by others from whom defendant had agreed to purchase them.—Jacobs v. Hershey Lumber Co., Wis., 102 N. W. Rep. 319.

157. WATERS AND WATER COURSES—Surface Water—Drainage.—Owners of lands may convey surface water therefrom by ditches or drainage, provided they do not cause unnecessary damage to adjoining owners.—Werner v. Popp, Minn., 102 N. W. Rep. 366.

158. WILLS—Estate Devised.—Where a testator gave certain property to his wife for life, with the superadded power to sell and appropriate the proceeds, it did not constitute her estate an absolute one; but her estate was a particular estate, expressly given.—Fiske v. Fiske's Heirs, R. I., 59 Atl. Rep. 740.

159. WILLS—Interest of Witness.—A witness to a will held not disqualified by reason of the fact that his grandson was pecuniarily interested in sustaining the same.—O'Brien v. Bonfield, Ill., 72 N. E. Rep. 1090.

160. WILLS—Lands in Foreign State.—A will executed in Tennessee by a citizen of that state may operate as a valid will of lands in Arkansas, and is controlled by the laws of the latter state.—Haggart v. Ranney, Ark., 84 S. W. Rep. 703.

161. WILLS—Notice to Heirs at Probate Proceeding.—Under the statute requiring the heirs of a testator who are known to be notified of the probate of the will, a court has no jurisdiction to probate the will without notice to the heirs.—Floto v. Floto, Ill., 72 N. E. Rep. 1092.

162. WITNESSES—Evidence—Colloquies with Deceased.—In homicide, held error to permit state's attorney to testify as to what a witness, who had testified to dying declarations, had told him.—Flowers v. State, Miss., 37 So. Rep. 814.

163. WITNESSES — Evidence — Intercepted Letter.—A letter from accused to his wife, intercepted and never delivered to her, is admissible.—Hammons v. State, Ark., 84 S. W. Rep. 718.

164. WITNESSES—Physicians—Privileged Communications.—Where a child was taken to a physician for an examination to determine whether she had a venereal disease only, he was not precluded from testifying with reference thereto by Rev. St. 1898, § 4075.—James v. State, Wis., 102 N. W. Rep. 320.

165. WITNESSES—Reference to Memorandum.—If a person can testify to a matter by reference to a memorandum made by him, he may do so, though he cannot recall such matter to mind so as to testify from present remembrance.—Manning v. School Dist. No. 6 of Ft Atkinson, Wis., 102 N. W. Rep. 356.